IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

No. 21708

GLENN M. WILT AND SANDRA B. WILT
Plaintiffs Below, Appellees

v.

ROBERT BURACKER, SHERIFF AS SUCCESSOR IN INTEREST TO ROY E. THOMPSON, ADMINISTRATOR
TO THE ESTATE OF CHARLES W. NICKELSON, JR.,
Defendant Below, Appellant

Appeal from the Circuit Court of Jefferson County
Honorable Ronald E. Wilson, Judge
Civil Action No. 88-C-186

AFFIRMED, IN PART,
REVERSED, IN PART,
AND REMANDED

Submitted: September 28, 1993
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JUSTICE MILLER delivered the Opinion of the Court.

JUSTICE NEELY concurs and reserves the right to file a concurring opinion.

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SYLLABUS BY THE COURT

1. Under Rule 702 of the West Virginia Rules of Evidence, there is a category of expert testimony based on scientific methodology that is so longstanding and generally recognized that it may be judicially noticed and, a trial court need not ascertain the basis for its reliability.

2. In analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence, the trial court's initial inquiry must consider whether the testimony is based on an assertion or inference derived from the scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community.

3. "'"Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." Point 5, Syllabus,
Overton v. Fields, 145 W. Va. 797

[117 S.E.2d 598 (1960)].' Syllabus Point 4, Hall v. Nello Teer Co., 157 W. Va. 582, 203 S.E.2d 145 (1974)." Syllabus Point 12, Board of Education v. Zando, Martin & Milstead, 182 W. Va. 597, 390 S.E.2d 796 (1990).

4. The loss of enjoyment of life resulting from a permanent injury is part of the general measure of damages flowing from the permanent injury and is not subject to an economic calculation.

5. "In an injury case where the manifestations of the permanent injury may be obscure and the extent of the injury itself may be obscure because of its character, positive medical evidence to a degree of reasonable certainty that the injury is permanent is sufficient to take the question to the jury and to support an award of damages for the future effects of such injury." Syllabus Point 13, Jordan v. Bero, 158 W. Va. 28, 210 S.E.2d 618 (1974).

6. "'If there be evidence tending in some appreciable degree to support the theory of proposed instructions, it is not error to give such instructions to the jury, though the evidence be slight, or even insufficient to support a verdict based entirely on such theory.' Syllabus Point 2, Snedecker v. Rulong, 69 W. Va. 223, 71 S.E. 180 (1911)." Syllabus Point 4, Catlett v. MacQueen, 180 W. Va. 6, 375 S.E.2d 184 (1988).

7. "Prejudgment interest, according to West Virginia Code § 56-6-31 (1981) and the decisions of this Court interpreting that statute, is not a cost, but is a form of compensatory damages intended to make an injured plaintiff whole as far as loss of use of funds is concerned." Syllabus Point 1, Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, Inc., 186 W. Va. 583, 413 S.E.2d 404 (1991).

8. Expenditures for household services are included within the phrase "similar out-of-pocket expenditures" used in W. Va. Code, 56-6-31 (1981), and prejudgment interest may be awarded under that section.

9. "'Rule 59(a), [West Virginia Rules of Civil Procedure], provides that a new trial may be granted to any of the parties on all or part of the issues, and in a case where the question of liability has been resolved in favor of the plaintiff leaving only the issue of damages, the verdict of the jury may be set aside and a new trial granted on the single issue of damages.' Syl. pt. 4, Richmond v. Campbell, 148 W. Va. 595, 136 S.E.2d 877 (1964)." Syllabus Point 3, Gebhardt v. Smith, 187 W. Va. 515, 420 S.E.2d 275 (1992).

10. Where liability is clearly established and the jury has made an erroneous over-calculation of damages, a remittitur may be directed on remand. If the plaintiff declines

to accept the remittitur, then a new trial will be ordered solely on the issue of damages.

Miller, Justice:

This is an appeal from a jury verdict and final order of the Circuit Court of Jefferson County entered May 15, 1992, in favor of the appellees and plaintiffs below, Glenn M. Wilt and Sandra B. Wilt. The plaintiffs sustained permanent injuries when the automobile in which they were riding was struck by a vehicle driven by Charles W. Nickelson, Jr. Mr. Nickelson was killed in the collision, and this action was brought against his estate.

At trial, the plaintiffs presented the testimony of several police officers who testified that Mr. Nickelson had an empty bottle of "Wild Turkey" whiskey between his legs when they removed his body from the accident scene. The officers also testified that there were several other empty alcoholic beverage containers found in the vehicle and that the smell of alcohol coming from the vehicle was "extreme." Moreover, the deposition testimony of Lori Hall, a passenger in Mr. Nickelson's car, was read to the jury. It was to the effect that she and Mr. Nickelson had been drinking "Wild Turkey" whiskey earlier in the day, although she could not remember the quantity they had consumed.

The plaintiffs also presented the testimony of John Kaputska, who observed the Nickelson vehicle for several minutes

immediately prior to the accident[1] Mr. Kaputska testified that the Nickelson vehicle caught his attention because it was being driven erratically, was following his vehicle too closely, and was not being driven in a straight line. The Nickelson vehicle then passed Mr. Kaputska at a high rate of speed, and Mr. Kaputska lost sight of the Nickelson vehicle as it went around a curve in the road. As Mr. Kaputska came around the curve, he saw that the Nickelson vehicle had struck the Wilt vehicle.

I.

The primary reason we accepted this appeal was to determine whether the testimony of an economist calculating a monetary amount of damages for the loss of enjoyment of life, often called hedonic damages, is admissible evidence. This Court held in Flannery v. United States, 171 W. Va. 27, 297 S.E.2d 433 (1982), that damages for the loss of enjoyment of life are a valid element of recovery when a plaintiff has suffered a permanent injury.[2] "[O]nce a permanent injury has been established . . . the plaintiff is entitled to additional damages . . . for the permanent effect of the injury itself on 'the capability of an individual to function as a whole man.'" 171 W. Va. at 30, 297 S.E. 2d at 436, quoting Jordan v. Bero, 158

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[1]Mr. Kaputska was driving his vehicle along the same road and in the same direction as the Nickelson vehicle.

[2]A recent article by D. L. Price entitled Hedonic Damages: To Value a Life Or Not to Value a Life, 95 W. Va. L. Rev. 1055 (1993), discusses this question with some emphasis on Flannery v. United States, supra.

W.Va. 28, 51, 210 S.E.2d 618, 634 (1974). We went on to explain in Flannery:

> "[T]he loss of enjoyment of life is encompassed within and is an element of the permanency of the plaintiff's injury. To state the matter in a slightly different manner, the degree of permanent injury is measured by ascertaining how the injury has deprived the plaintiff of his customary activities as a whole person. The loss of customary activities constitutes the loss of enjoyment of life." 171 W. Va. at 30, 297 S.E.2d at 436.

A.

Before we embark on a discussion of hedonic damages, it is necessary to establish the test for admissibility of expert testimony. Our cases contain some variation on this issue, particularly after our adoption of Rule 702 of the West Virginia Rules of Evidence.[3] We note that our Rule 702 is identical to Rule 702 of the Federal Rules of Evidence. Of some significance, then, is the United States Supreme Court's recent decision in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. _ , 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), that discussed the relationship of Rule 702 with the traditional federal evidentiary

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[3]Rule 702 of the West Virginia Rules of Evidence states:

> **"Rule 702. Testimony by Experts.**
> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert

by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

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rule on expert testimony that was first articulated in Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923).[4]

Before we adopted Rule 702, we recognized the Frye test and set out our version of it in Syllabus Points 7 and 8 of State v. Clawson, 165 W. Va. 588, 270 S.E.2d 659 (1980):

> "7. In order for a scientific test to be initially admissible, there must be general acceptance of the scientific principle which underlies the test."
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> "8. There are certain scientific tests that have been widely used over a long period of time, such that their general acceptance in the scientific community can be judicially noticed."

See also State v. Armstrong, 179 W. Va. 435, 369 S.E.2d 870 (1988); State v. Barker, 179 W. Va. 194, 366 S.E.2d 642 (1988). As we stated in Syllabus Point 8 of Clawson, where the scientific test is generally accepted, it can be judicially noticed and the

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[4]Frye propounded a "general acceptance" test for scientific principles that was explained as follows:

> "Just when a scientific principle or discovery crosses the line between the experimental and the demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently

established to have gained general acceptance in the particular field in which it belongs." 54 App. D.C. at 47, 293 F. at 1014.

expert need not demonstrate its scientific validity.[5] We also stated in note 4 of State v. Armstrong, 179 W. Va. at 439-40, 369 S.E.2d at 874-75 (1988), that there is a general trend under Rule 702 to liberalize the Frye rule:

> "An increasing number of the courts and many of the leading commentators interpret Rule 702 of the Federal Rules of Evidence, which is identical to our Rule 702, as limiting the Frye 'general acceptance' test to a test solely for determining whether judicial notice can be taken of the scientific test's general reliability. See P. Giannelli and E. Imwinkelreid, Scientific Evidence §§ 1-5, 1-5 (E)-(F), 1-6, 1-6(A)-(D) (1986) (collecting authorities); Giannelli, General Acceptance of Scientific Tests--Frye and Beyond, in Scientific and Expert Evidence 11-32 (E. Imwinkelreid 2d ed. 1981). Therefore, according to this view, a scientific expert's testimony is admissible if shown to involve relevant scientific tests which assist the trier of fact to understand the evidence, even if such tests and the underlying scientific principle(s) are not yet generally accepted in the particular scientific field." (Emphasis in original).

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[5]We elaborated on this point in State v. Woodall, 182 W. Va. 15, 22, 385 S.E.2d 253, 260 (1989):

> "The basic reliability of scientific tests is often at issue when such evidence is admitted. Judicial resources can be squandered attacking and supporting scientific tests that are, in fact, generally accepted by scientists in the field. . . . For reasons of

judicial economy, at some point a trial court may take judicial notice of a test's general reliability. This point occurs when the issue of a test's reliability has been addressed authoritatively by senior appellate courts in a line of cases that determine that the test in question is generally accepted by scientists. This comports with the provisions of W.Va.R.Evid., Rule 201 [1985]."

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In Daubert, supra, the United States supreme Court re-examined the Frye standard and determined that it was too stringent as applied to the admissibility of expert testimony in light of Rule 702 of the Federal Rules of Evidence. The plaintiffs in Daubert sought to introduce expert testimony showing the relationship between a drug manufactured by the defendant and birth defects in children whose mothers had taken the drug while pregnant with those children. The defendant argued that the expert testimony offered by the plaintiffs could not meet Frye's "general acceptance" test. The trial court and the Ninth Circuit Court of Appeals agreed,[6] with the Court of Appeals stating that because the expert testimony proffered had not been published or subjected to peer review, it could not be shown to be a generally accepted scientific technique, and was thus violative of the Frye standard.

The United States Supreme Court reversed and held that the Frye test was superseded by Rule 702 because the Frye test was not included within Rule 702:

> "Nothing in the text of (Rule 702] establishes 'general acceptance' as an absolute prerequisite to admissibility. . . . The drafting history makes no mention of Frye, and a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.' Beech Aircraft Corp. v. Rainey, 488 U.S. 439, 450, 102 L. Ed. 2d 445, 463 (1988)] (citing Rules 701 to

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[6]See 951 F.2d 1128 (9th Cir. 1991).

705)." 509 U.S. at ___, 113 S. Ct. at 2794, 125 L. Ed. 2d at 480. (Citation omitted.)[7]

Nonetheless, the Supreme Court clearly concluded that the standard established in Rule 702 would not "result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions." 509 U.S. at _, 113 S. Ct. at 2798, 125 L. Ed. 2d at 484.[8] The Supreme Court emphasized that in supplanting the Frye test by Rule 702, this did not abandon all limits on the admissibility of purportedly scientific evidence, but rather that, "under the Rules [of Evidence] the trial judge must ensure that any and all scientific

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[7]The Supreme Court went on to state:

> "Given the Rules, permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention 'general acceptance,' the assertion that the Rules somehow assimilated Frye is unconvincing. Frye made 'general acceptance' the exclusive test for admitting expert scientific testimony. That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials." 509 U.S. at _, 113 S. Ct. at 2794, 125 L. Ed. 2d at 480. (Footnote omitted).

[8]The Supreme Court stated that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. See Rock v Arkansas, 483 U.S. 44, 61, [107 S. Ct. 2704, 2714, 97 L. Ed. 2d 37, 52] (1987)." 509 U.S. at _, 113 S. Ct. at 2798, 125 L. Ed. 2d at 484.

The Court also noted that a trial court may direct a verdict where it reaches the conclusion "that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true[.]" 509 U.S. at ___, 113 S. Ct. at 2798, 125 L. Ed. 2d at 484.

testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 113 S. Ct. at 2795, 125 L. Ed. 2d at 480.

The Supreme Court outlined the various types of considerations that a trial court must take into account when determining the admissibility of expert testimony under Rule 702,[9] and concluded that the inquiry must be a flexible one:[10]

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[9]Procedurally, as the Supreme Court observed in Daubert: "Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." 509 U.S. at _, 113 S. Ct. at __, 125 L. Ed. 2d at 482. (Footnotes omitted).

[10]The considerations named by the Supreme Court include:

(1) A determination of whether the expert testimony is in fact "scientific knowledge." ("[I]n order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation--i.e., 'good grounds,' based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." 509 U.S. at _, 113 S. Ct- at 2795, 125 L. Ed. 2d at 481.).

(2) A determination of whether the expert evidence or testimony will "'assist the trier of fact to understand the evidence or to determine a fact in issue.' This condition goes primarily to relevance." 509 U.S. at _, 113 S. Ct. at 2795, 125 L. Ed. 2d at 481. ("Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." 509 U.S. at _, 113 S. Ct. at 2796, 125 L. Ed. 2d at 482.).

(3) "[A] preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." 509 U.S. ___, 113 S. Ct. at 2796, 125 L. Ed. 2d at 482. (Relevant

considerations thereto include (a) whether the theory or technique "can be (and has been) tested"; (b) "whether the theory

"[The] overarching subject [of Rule 702] is the scientific validity--and thus the evidentiary relevance and reliability--of the principles that underlie a proposed submission. The focus, of course, must be solidly on principles and methodology, not the conclusions that they generate." 509 U.S. at ___,113 S. Ct. at 2797, 125 L. Ed. 2d at 484.

The Court also recognized:

> "[I]n practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for particularized resolution of legal disputes." 509 U.S. at _, 113 S. Ct. at 2798-99, 125 L. Ed. 2d at 485. (Footnote omitted).

In summary, the Supreme court concluded:

> "'[G]eneral acceptance' is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence--especially Rule

> 702--do assign to the trial judge the task of ensuring that an expert's testimony both rests upon a reliable

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or technique has been subjected to peer review and publication" ("The fact of publication (or lack thereof) in a peer-reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised."); (c) what is the known or potential rate of error of particular scientific techniques; and (d) whether there is general acceptance of the theory ("Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique that has been able to attract only minimal support within the community,' [United States v.] Downing, [753 F.2d 1224, 1238 (3d Cir. 1985),] may properly be viewed with skepticism."). 509 U.S. at ___,113 S. Ct. at 2797, 125 L. Ed. 2d at 483. (Citation omitted).

> foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands." 509 U.S. at _, 113 S. Ct. at 2799, 125 L. Ed. 2d at 485.

We also note that the Court in Daubert found that certain scientific theories could be judicially noticed. The Court stated in note 11: "Of course, well-established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Fed. Rule Evid. 201." 509

U.S. at _, 113 S. Ct. at 2796, 125 L. Ed. 2d at 482. See also note 5, supra. We also are of the view that, under Rule 702, there is a category of expert testimony based on scientific methodology that is so longstanding and generally recognized that it may be judicially noticed, and, therefore, a trial court need not ascertain the basis for its reliability.

Thus, we believe that Daubert is directed at situations where the scientific or technical basis for the expert testimony cannot be judicially noticed and a hearing must be held to determine its reliability. We conclude that Daubert's analysis of Federal Rule 702 should be followed in analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence. The trial court's initial inquiry must consider whether the testimony is based on an assertion or inference derived from scientific methodology. Moreover, the

testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community.[11]

B.

Our customary rule for determining whether a trial court's ruling on the admissibility of expert testimony is erroneous is contained in Syllabus Point 12 of Board of Education v. Zando, Martin & Milstead, 182 W. Va. 597, 390 S.E.2d 796 (1990):

> "'"Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." Point 5,

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[11]We recognize that Rule 702 is not confined to scientific expert testimony, but applies to "scientific, technical, or other specialized knowledge[.]" The Supreme Court in Daubert, supra, confined its discussion to scientific expert testimony. The two justices who joined in a separate opinion concurring, in part, and dissenting, in part, raised the question: "Does all of this dicta apply to an expert seeking to testify on the basis of 'technical or other specialized knowledge' . . . or are the

'general observations' limited only to 'scientific knowledge'?" 509 U.S. at _, 113 S. Ct. at ___, 125 L. Ed. 2d at 487. The foregoing textual standards may still be applied to any expert by deleting the word 'scientific."

> syllabus, Overton v. Fields, 145 W. Va. 797 [117 S.E.2d 598 (1960)].' Syllabus Point 4, Hall v. Nello Teer Co., 157 W. Va. 582, 203 S.E.2d 145 (1974)."

Applying Rule 702 to the case at bar, we must consider whether the specialized knowledge of the plaintiffs, expert was relevant[12] to the calculation of damages for the plaintiffs' loss of enjoyment of life such that it would assist the trier of fact to understand the evidence or to determine a fact in issue." Because we are not convinced that the testimony offered by the plaintiffs' expert has any relevance whatsoever to a calculation of damages for the loss of enjoyment of life, we conclude that the trial court abused its discretion by allowing the testimony at trial.

The economic calculations for Mrs. Wilt's claim for hedonic damages were presented through the testimony of economist Michael Brookshire, Ph.D. Dr. Brookshire utilized a theory that every human life has the same whole-life value. This "benchmark" whole-life value was arrived at by combining and averaging the economic values arrived at in over 50 "willingness-to-pay" studies.[13] According to Dr. Brookshire, this whole-life value is

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[12]As we stated in Gilman v. Choi, 185 W. Va. 177, 179, 406 S.E.2d 200, 202 (1990): "Rule 702 of the West Virginia Rules of Evidence . . . is concerned primarily with the relevancy of expert testimony. See syl. pts. 1-2, State v. McCoy, 179 W. Va. 223, 366 S.E.2d 731 (1988)." (Emphasis added).

[13]According to Dr. Brookshire, the bench-mark value of an abstract average American's whole life can be derived from willingness-to-pay studies. The willingness-to-pay studies are based upon several categories of statistical data obtained from the following sources: (1) wage risk studies of the United

the same for all persons and is set at $2.5 million. From this amount, he subtracts another average value that he terms the "economic machine." The economic machine represents the value of a person's average lifetime economic earnings, such as wages, fringe benefits, and household services. This value is estimated at $800,000, leaving as a "bench-mark" value $1.7 million, which is contended to be the general value of the loss of enjoyment of life to the average unknown American.

The plaintiffs also presented the testimony of a psychologist who estimated that Mrs. Wilt, based upon loss-of-enjoyment-of-life tests he had devised, had suffered a 51-60 percent loss of her enjoyment of life. Using the percentage assigned by the psychologist, Dr. Brookshire then calculated Mrs. Wilt's net economic loss of enjoyment of life by applying it to the bench-mark figure of $1.7 million and factoring in Mrs. Wilt's life expectancy. Mrs. Wilt's net economic loss of enjoyment of life was fixed at $685,493.

Our initial concern is that the willingness-to-pay studies upon which Dr. Brookshire's calculations are based have no relevance to the particular loss of enjoyment of life suffered by a plaintiff due to a given permanent injury. The willingness-to-pay studies that were used did not involve persons suffering a

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States Government that depict the wage--differential in high risk jobs; (2) behavioral studies focusing on a consumer's willingness to pay for safety devices; (3) economic cost estimates used by federal agencies issuing safety regulations; and (4) a combination of the foregoing.

permanent injury in a personal injury context. Moreover, the willingness-to-pay studies did not use methodology designed to calculate the loss of enjoyment of life, but were nonetheless extrapolated by Dr. Brookshire into what he claimed to be valid data for calculating damages for Mrs. Wilt's loss of enjoyment of life.

The underlying studies were not presented into evidence and are not a part of the record. Consequently, it is not possible to determine their precise methodology. Certainly, under any Rule 702 analysis, without a detailed explanation of the underlying studies' methodology, the expert testimony would not meet the reliability standard and the testimony should be excluded.

Even if we were to assume that Dr. Brookshire's explanation of the reliability of the willingness-to-pay studies was sufficient, the question would then be whether the studies were sufficiently relevant to support his calculations on loss of enjoyment of life. In his testimony, Dr. Brookshire gave an example of the loss-of-enjoyment-of-life methodology. This example was based on wage-versus-risk studies and involved a hypothetical illustration of 10,000 window washers working on skyscrapers and the risk of death between those working on the first-floor windows and those working on the top floors. From federal statistics, he found a 1 in 10,000 greater chance of death for top-floor window washers than other window washers. He

then assumed a wage differential of $300 per year for top-floor washers. Thus, the bottom-floor washers were willing to accept $300 less a year to avoid the top-floor work. He concluded that if the 10,000 workers were willing to accept $300 less, then the value of one life in that context is $3,000,000.[14]

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[14]The testimony in this regard was as follows:

"Q. Could you discuss in more detail how the studies of differing wage rates [versus] different risks of death generate values of life from the actual decisions of workers?

"A. Yes, there are four foundations for that two and-a-half million dollar conclusion. The first is something called: Wage [versus] risks studies.

> "Let me try to give you an example of how these studies work. Lets talk about first floor window washers on skyscrapers [versus] top floor window washers on sky [scrapers]. They do exactly the same job. But let's assume that out of every 1000 such window washers those who work on the top floor have a 1 in 10,000 greater chance of death on the job. We know that from federal statistics by occupation on what the death risk is.
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> * * *
>
> "So, if there is 1 in 10,000 difference in death what if the economists
> . . . and this is what happens in these studies that I am going to talk about, look
> at the average wage differentials, this comes from Adam Smith, what if we knew that there was an average wage difference of $300.00 a year for 10,000 first floor window washers.

"That is, they are willing to pay these first floor window washers $300.00 a year in terms of lower wages: 'we will accept $300.00 a year just don't make us go on that top floor.'

"That means that 10,000 workers

Although the foregoing illustration was not taken from any of the willingness-to-pay studies, Dr. Brookshire testified that it was designed to illustrate the methodology used in a wage-versus-risk study approach to determine the total value of a life. Even if we were to assume that this methodology has some valid economic basis, we reject it from a legal standpoint because it has nothing to do with defining the particular value of the loss of enjoyment of life in this case.[15]

Moreover, the calculations are based on assumptions that appear to controvert logic and good sense. Anyone who is familiar with the wages of coal miners, policemen, and firefighters would scoff at the assertion that these high risk jobs have any meaningful extra wage component for the risks undertaken by workers in those professions.[16]

> were willing to pay $300.00 each, that is three million dollars, to save one human life. Remember if they go up to the top floor one of those 10,000 will die."

[15]The willingness-to-pay studies do not relate in any way to the actual component of damages, the enjoyment of life.

[16]Another illustration was given to disclose the methodology underlying the value of the average life by using studies on consumers' willingness to pay for safety devices to protect their lives. Dr. Brookshire set the cost of an automobile airbag at $300 and indicated that highway death statistics showed that with an airbag the risk of death went down by 1 in 10,000, that is, one life will be saved if 10,000 people have air bags. He then concluded:

> "Let's say we do a study on air bags, and this is one that economists have done, we knew [sic] that out of 10,000 people that buy air bags they pay an

average of . . . let's give you the same number, $300.00 a year for an air bag. I think it is more expensive

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The majority of jurisdictions that have addressed whether expert testimony based upon willingness-to-pay studies is relevant to one's loss of enjoyment of life have concluded that such testimony is inadmissible. The most thorough analysis of this issue was made by the Court of Appeals for the Seventh Circuit in Mercado v. Ahmed, 974 F.2d 863, 871 (7th Cir. 1992):

> "[W]e have serious doubts about [the] assertion that the studies [relied] upon actually measure how much Americans value life. For example, spending on items like air bags and smoke detectors is probably influenced as much by advertising and marketing decisions made by profit-seeking manufacturers and by government-mandated safety requirements as it is by any consideration by consumers of how much life is worth. Also, many people may be interested in a whole range of safety devices and believe they are worthwhile, but are unable to afford them. More fundamentally, spending on safety items reflects a consumer's willingness to pay to reduce risk perhaps more a measure of how cautious a person is than how much he or she values life. Few of us, when confronted with the threat, 'Your money or your life!' would, like Jack Benny, pause and respond, 'I'm thinking, I'm thinking.' Most of us would empty our wallets. Why that decision reflects less the value we place on life than

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than that, but let's just use the same example; $300.00 each for an air bag.

"Let's say that we knew the highway death statistics, and by the mid 1980s we did know these things, we didn't have these statistics until the mid 1980s, that with an air bag the risk of death goes down about 1 in 10,000. Out of 10,000 people one life will be saved if 10,000 folks have an air bag.

"What does that mean? 10,000 people spend $300.00 each, that is three million in total, to save one life."

whether we buy an airbag is not immediately obvious." (Emphasis in original).

The Mercado court also addressed the relevancy of other studies that have been used to support calculations for hedonic damages. Those studies were similar to the ones used by Dr. Brookshire and included the amount of extra salary paid to those who perform risky work. Another study focused on government estimates concerning increased costs for complying with health and safety regulations:

> "To say that the salary paid to those who hold risky jobs tells us something significant about how much we value life ignores the fact that humans are moved by more than monetary incentives. For example, someone who believes police officers working in an extremely dangerous city are grossly undercompensated for the risks they assume might nevertheless take up the badge out of a sense of civic duty to their hometown. Finally, government calculations about how much to spend (or force others to spend) on health and safety regulations are motivated by a host of considerations other than the value of life: is it an election year? how large is the budget deficit? on which constituents will the burden of the regulations fall? what influence and pressure have lobbyists brought to bear? what is the view of interested constituents? And so on." 974 F.2d at 871. (Emphasis ,added).[17]

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[17]The Seventh Circuit in an earlier case, Sherrod v. Berry, 827 F.2d 195 (7th Cir. 1987) (applying Indiana law), approved expert testimony for calculation of economic damages for loss of enjoyment of life. Sherrod was reversed, en banc, on other grounds. 856 F.2d 802 (7th Cir. 1988). It would appear that Mercado settled this issue and, in effect, overruled Sherrod. See also Southlake Limousine & Coach, Inc. v. Brock, 578 N.E.2d 677 (Ind. App. 1991) (rejecting expert calculations for hedonic damages).

In Foster v. Trafalaer House Oil & Gas, 603 So.2d 284 (La. App. 1992), the court recognized, as we did in Flannery, that the loss of enjoyment of life is an element of general damages. That court went on to elaborate on the nature of the task of determining the amount of such damages:

> "[C]ompensation [for general damages] is never a true measure or a true compensation for what is lost. The task of awarding general damages is a uniquely human endeavor, not only calling upon the trier of fact to consider the host of factors unique to each individual case, but also requiring the trier of fact to draw upon the virtually unlimited factors unique to us as human beings . . .
>
> "[E]conomic theories which attempt to extrapolate the 'value' of human life from various studies of wages, costs, etc., have no place in the calculation of general damages." 603 So. 2d at 286.

See also Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993) (applying North Carolina law); Sterner v. Wesley College, Inc., 747 F. Supp. 263 (D. Del. 1990) (applying Delaware law); Fetzer v. Wood, 211 Ill. App. 3d 70, 84, 155 Ill. Dec. 626, _ , 569 N.E.2d 12371 1246 (1991) ("the jury is in a better position to decide without imposing an expert's theory as to valuation.").

Finally, in order to lay to rest any future confusion over whether a different methodology can make this type of

evidence admissible under Rule 702, we believe this issue is similar to that addressed in Crum v. Ward, 146 W. Va. 421, 122 S.E.2d 18 (1961). In Crum, we held that, from a substantive law standpoint, testimony could not be introduced placing a monetary

value on a plaintiff's pain and suffering. As we stated in Syllabus Point 4 of Crum: "In the trial of an action for damages for personal injuries based in part on pain and suffering, testimony attempting to place a money value on pain and suffering is inadmissible."

Moreover, not unlike the situation addressed in Crum, in Flannery, supra, we discussed the question of loss of enjoyment of life in terms of a subjective jury evaluation issue rather than as an objective calculable item:

> "Here, however, we have an element, a component, of damages that may be considered by a jury in determining the amount of its award. Just as a jury may consider the nature, effect and severity of pain when fixing damages for personal injury, or may consider mental anguish caused by scars and disfigurement, it may consider loss of enjoyment of life." 171 W. Va. at 32, 297 S.E.2d at 438. (Emphasis in original; citations omitted).[18]

Consequently, we conclude that the loss of enjoyment of life resulting from a permanent injury is part of the general measure of damages flowing from the permanent injury and is not subject to an economic calculation.

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[18]It should be noted that Flannery came to us as certified questions from the Court of Appeals for the Fourth Circuit based on its determination that damages for personal injuries under the Federal Tort Claims Act, 28 U.S.C. SS 2671, were to be determined under the state law where the injury occurred. See Flannery v. United States, 649 F.2d 270 (4th Cir. 1981). After receiving our answers to the certified questions, the Fourth Circuit decided that federal law applied and declined to follow our

answers. Flannery v. United States, 718 F.2d 108 (4th Cir. 1983), cert. denied, 467 U.S. 1226, 104 S. Ct. 2679, 81 L. Ed. 2d 874 (1984).

II.

A.

Future Dental Expenses

The defendant also cites as error the admission of, the testimony of the plaintiffs' dental expert, Dr. Leroy Jackson, who testified concerning the future dental expenses that Mr. Wilt would incur. The defendant contends that Dr. Jackson was unable to testify with a reasonable degree of certainty about Mr. Wilt's future dental expenses. The jury awarded Mr. Wilt $5000 under this category of damages. Dr. Jackson stated that while Mr. Wilt had dentures prior to the car accident, those dentures would have to he replaced because, prior to the accident, Mr. Wilt required only a partial-plate denture, and after the accident, he required a full-plate denture. Dr. Jackson testified that, to a reasonable degree of medical certainty, he was certain that Mr. Wilt would require one or two additional upper dentures in his lifetime.[19] Dr. Jackson was not asked to separate the difference between Mr. Wilt's dental impairment before and after the accident.

In Syllabus Point 13 of Jordan v. Bero, supra, we stated:

> "In an injury case where the manifestations of the permanent injury may be obscure and the extent of the injury itself may be obscure because of its character, positive medical evidence to a degree of reasonable certainty that the injury is

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[19]Dr. Jackson testified that the 1991 cost for the type of upper denture needed by Mr. Wilt was $550.

> permanent is sufficient to take the question to the jury and to support an award of damages for the future effects of such injury."

It is clear that Dr. Jackson testified to a degree of reasonable certainty that Mr. Wilt had suffered a permanent dental injury as a result of the accident. Thus, it was not error for the trial court to allow Dr. Jackson's testimony to be considered by the jury and the jury was free to award damages for the future effects of Mr. Wilt's injury.

B.

Punitive Damages

The jury verdict included an itemized award of $500,000 in punitive damages to each of the plaintiffs. The defendant contends that such a large award of punitive damages was violative of constitutional due process safeguards. The defendant also contends that it was error, under the evidence presented at trial, for the trial court to instruct the jury that driving under the influence of alcohol was evidence of reckless negligence and that punitive damages could be awarded therefor.

The instruction given by the trial court regarding driving under the influence of alcohol was as follows: "By statute in W. Va. a person may not drive a vehicle in this State while he is under the influence of alcohol and a person may not drive a vehicle in reckless disregard of the safety of others." The defendant contends that giving such an instruction was error

because no direct evidence was admitted at trial to the effect that Mr. Nickelson was intoxicated or driving under the influence of alcohol. We disagree. The instruction given by the trial court is in line with several of our cases where we recognized that a person who drives while under the influence of alcohol in reckless disregard of the safety of others may be subject to an award of punitive damages. See Hensley v. Erie Ins. Co., 168 W. Va. 172, 283 S.E.2d 227 (1981). Cf. Perry v. Melton, 171 W. Va. 397, 299 S.E.2d 8 (1982).

There was abundant testimony to the effect that Mr. Nickelson had been drinking "Wild Turkey" whiskey shortly before the accident, and that the "Wild Turkey" bottle was between his legs at the time of the accident. Moreover, the investigating police officers noticed an "extreme" smell of alcohol coming from the vehicle, and Mr. Nickelson was observed driving "erratically" and at a "high rate of speed" immediately before the accident. As we stated in Syllabus Point 4 of Catlett v. MacQueen, 180 W. Va. 6, 375 S.E.2d 184 (1988):

> "'If there be evidence tending in some appreciable degree to support the theory of proposed instructions, it is not error to give such instructions to the jury, though the evidence be slight, or even insufficient to support a verdict based entirely on such theory.' Syllabus Point 2, Snedecker v. Rulong, 69 W. Va. 223, 71 S.E. 180 (1911)."

Clearly, the evidence presented by the plaintiffs was sufficient to instruct the jury that driving under the influence of alcohol

is prohibited by statute in this State, and the trial court did not commit error by giving that instruction.

The defendant also contends that the award of punitive damages violated constitutional due process guarantees because the trial court failed to adequately instruct the jury so as to protect the defendant from a punitive award "grossly disproportionate to the severity of the offense or to accomplish society's goals of punishment and deterrence[.]" Our general rule on the adequacy of jury instructions concerning punitive damages was stated in Syllabus Point 13 of TXO Production Corp. v. Alliance Resources Corp., 187 W. Va. 457, 419 S.E.2d 870 (1992), aff'd, 509 U.S. ___, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993). We find that the jury instruction was adequate under TXO and, under this standard, the amount of punitive damages awarded was not improper even if the hedonic damage evidence had been excluded.

C.

Prejudgment Interest

The defendant argues that the trial court erred when it awarded the plaintiffs prejudgment interest an their award of damages for the loss of household services. There was undisputed testimony at trial that a cousin of Mr. Wilt's performed those services because Mrs. Wilt was unable to do so, and that the cousin accepted significantly less compensation from the plaintiffs than the going rate for those services. The

defendant contends that household services are not "special damages" under W. Va. Code, 56-6-31 (1981), and thus prejudgment interest may not be paid on that award. We disagree.

W. Va. Code 56-6-31, states, in pertinent part:

> "[I]f the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of such special or liquidated damages shall bear interest from the date the right to bring the same shall have accrued, as determined by the court. Special damages includes lost wages and income, medical expenses, damages to tangible personal property, and similar out-of-pocket expenditures, as determined by the court." (Emphasis added).

As we stated in Syllabus Point 1 of Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, Inc., 186 W. Va. 583, 413 S.E.2d 404 (1991):

> "Prejudgment interest, according to West Virginia Code § 56-6-31 (1981) and the decisions of this Court interpreting that statute, is not a cost, but is a form of compensatory damages intended to make an injured plaintiff whole as far as loss of use of funds is concerned."

It is clear to us that expenditures for household services are included within the phrase "similar out-of-pocket expenditures" used in W. Va. Code, 56-6-31, and

prejudgment interest may be awarded under that section. They are out-of-pocket funds the plaintiffs lost due to the negligence of the defendant's decedent and are intended to make the plaintiffs whole. Thus, household services expenditures are special damages for the purposes of W. Va. Code, 56-6-31, and the trial court did not err by awarding

prejudgment interest upon those damages.

III.

Because the hedonic damage evidence was improperly admitted, this case must be remanded. We recognized in Syllabus Point 3 of Gebhardt v. Smith, 187 W. Va. 515, 420 S.E.2d 275 (1992), that where liability has been clearly established and, on appeal, error has been found to have occurred, a new trial may be awarded on that issue alone:

> "'Rule 59(a), [West Virginia Rules of Civil Procedure], provides that a new trial may be granted to any of the parties on all or part of the issues, and in a case where the question of liability has been resolved in favor of the plaintiff leaving only the issue of damages, the verdict of the jury may be set aside and a new trial granted on the single issue of damages.' Syl. pt. 4, Richmond v. Campbell, 148 W. Va. 595, 136 S.E.2d 877 (1964)."

In Roberts v. Stevens Clinic Hospital, Inc., 176 W. Va. 492, 345 S.E.2d 791 (1986), the jury awarded damages in the amount of $10 million in a wrongful death claim of a two-and-one-half-year old child. We found the award excessive and remanded the case with directions to the circuit court "to enter a remittitur of $7,000,000 and enter judgment on the verdict for $3,000,000 or, in the alternative, at the option of the plaintiff, to award a new trial." 176 W. Va. at 504, 345 S.E.2d at 804.

Another approach was taken in Harlems v. First

National Bank in Fairmont, 169 W. Va. 673, 289 S.E.2d 692 (1982). There, the jury returned a verdict in a personal injury case, which was

broken down into various components. Upon analyzing the various damage components of the award, we found that some were not legally authorized under the facts of the case. The total award of damages was $80,000; however, we determined that the correct award should have been $25,000 and came to this conclusion:

> "We, therefore, accord the right of remittitur to the plaintiff on the basis that he may accept within forty-five days from the mandate of this Court a judgment of $25,000 together with interest thereon from the date of the jury verdict against the Bank and Wilson or the judgment will be set aside and he shall be entitled to a new trial on the issue of damages." 169 W. Va. at 698, 289 S.E.2d at 706.

Thus, these cases illustrate the principle that where liability is clearly established and the jury has made an erroneous over-calculation of damages, a remittitur may be directed on remand. If the plaintiff declines to accept the remittitur, then a new trial will be ordered solely on the issue of damages.

Consequently, we conclude that because the plaintiffs offered substantial evidence supporting all their damage claims except for Mrs. Wilt's claim for loss of enjoyment of life, which was assessed separately by the jury, we remand the case with instructions that if the plaintiffs wish to remit the hedonic damage award, judgment may be entered on the remaining damages. [20]

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[20]The jury's award to Mrs. Wilt, without the hedonic damage component, was $88,387.57 for hospital, doctor, and medical expenses and an additional $30,000 for such future expenses. Additionally, she received

$25,000 for future pain and suffering, and $120,000 for past and future loss of household

if not, then the plaintiffs may have a new trial on the damage issue alone because liability clearly has been established.[21]

Therefore, the judgment of the Circuit Court of Jefferson County is affirmed, in part, reversed, in part, and remanded.

Affirmed, in part;

reversed, in part;

and

remanded.

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services. These compensatory damages totaled $263,387.57. The hedonic damage award was $225,000. When these latter damages are removed, there is still an adequate basis to sustain the $500,000 punitive damage award for Mrs. Wilt under TXO Production Corp. v. Alliance Resources Corp., supra. The same is true of Mr. Wilt who received compensatory damages in the amount of $44,973.84 and punitive damages of $500,000.

[21]Other jurisdictions have recognized the power of an appellate court to reverse a judgment in regard to only that portion of the judgment that is in error. In particular, they have held, as is the case here, that a judgment may be reversed on a portion of compensatory damages while sustaining an award for punitive damages. See Kerr v. First Commodity Corp., 735 F.2d 281 (8th Cir. 1984); Flame Coal Co. v. United Mine Workers, 303 F-2d 39 (6th Cir.), cert. denied, 371 U.S. 891, 83 S. Ct. 186, 9 L. Ed. 2d 125 (1962); Higginbotham v. O'Keeffe, 340 S.W.2d 350 (Tex. Civ. App. 1960). See generally, 97 A.L.R.2d 1145 (1964 & Supps. 1983 & 1993); 5 C.J.S. Appeal & Error § 1918 (1993); 5 Am. Jur. 2d Appeal & Error § 940 (1962 & Supp. 1993).

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of December, 1993, the following order was made and entered:

Glenn M. Wilt and Sandra B. Wilt,
Plaintiffs Below, Appellees

vs.) No. 21708

Robert Buracker, Sheriff as Successor in
Interest to Roy E. Thompson, Administrator
to the Estate of Charles W. Nickelson, Jr.,
deceased, Defendant Below, Appellant

The Court, having maturely considered the transcript of the record, the brief Amicus Curiae tendered on behalf of the Defense Trial Counsel of West Virginia, the brief Amicus Curiae tendered on behalf of the West Virginia Chamber of Commerce, and the oral argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in the judgment of the Circuit Court of Jefferson County, rendered on the 18th day of November, 1992, but not such as to require reversal of the entire judgment. It is therefore considered and ordered that said judgment is affirmed insofar as the circuit court's awarding of prejudgment interest on the plaintiffs' award of damages for the loss of household services; the circuit court's admission of the testimony of plaintiffs' dental expert, Dr. Leroy Jackson; the instructions given by the trial court; and the award of punitive damages, but insofar as the circuit court's ruling allowing hedonic damages evidence, the

same is reversed, set aside and annulled. AND this action is remanded to the Circuit Court of Jefferson County with directions that if the plaintiffs wish to remit the hedonic damages award, judgment may be entered on the remaining damages. If not, then the plaintiffs may have a new trial on the damages issue alone since liability clearly has been established; all of which is ordered to be certified to the Circuit Court of Jefferson County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Miller, was concurred in by Chief Justice Workman and Justices Brotherton, Neely and McHugh. Justice Neely reserves the right to file a concurring opinion.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk, Supreme Court of
Appeals

Appendix Tab B

No. 21708

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

ROBERT BURACKER, SHERIFF,
as Successor in Interest to
ROY E. THOMPSON, Administrator
to the Estate of Charles W.
Nickelson, Jr., deceased,

Appellant,

v.

GLENN M. WILT and
SANDRA B. WILT,

Appellees.

Appeal From The Circuit Court of
Jefferson County, West Virginia
Civil Action No. 88-C-186

PETITION FOR REHEARING

MARTIN & SEIBERT, L.C.

Walter M. Jones, III
E. Kay Fuller
Post Office Box 1286
119 South College Street
Martinsburg, WV 25401
(304) 267-8985

Counsel for Appellant

Comes now the Appellant, Robert Buracker, Sheriff, as Successor in Interest to Roy E. Thompson, Administrator to the Estate of Charles W. Nickelson, Jr., deceased, by and through his counsel Walter M. Jones, III, E. Kay Fuller, and Martin & Seibert, L.C. and petitions this Court pursuant to Rule 24 (a) of the West Virginia Rules of Appellate Procedure for a rehearing on the issue of punitive damages raised in the instant appeal.

I. NATURE OF PROCEEDINGS AND RULING BELOW

1. The Appellant, Robert E. Buracker, Sheriff, as Successor in Interest to Roy E. Thompson, Administrator to the Estate of Charles W. Nickelson, Jr., deceased, hereinafter referred to only as Robert Buracker, previously appealed the Order of November 16, 1992, of the Circuit Court of Jefferson County, West Virginia, seeking a reversal thereof.

2. The petit jury of the Circuit Court of Jefferson County, West Virginia returned a verdict in favor of the Appellees, December 22, 1991, in the amount of $1,533,361.30. The verdict included an award of punitive damages in the amount of $1,000,000.00, apportioned $500,000.00 to each Appellee.

3. This Honorable Court ruled December 13, 1993, that hedonic damages testimony presented during the trial of this action was inadmissible.

4. The $1,000,000.00 award of punitive damages was in part based upon this inadmissible testimony.

5. The Appellant, therefore, seeks a reversal of the punitive damage award which was based upon inadmissible

evidence.

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II. STATEMENT OF FACTS

This litigation arises from a fatal collision on U.S. 340 in Jefferson County, West Virginia, which occurred May 3, 1986. On May 3, 1986, Charles W. Nickelson, Jr., deceased, was operating his motor vehicle northbound on U.S. 340; passengers in his car were Lori Stokley Hall and Charles W. Nickelson, III, deceased. At approximately 6:17 p.m., a head-on collision occurred between the vehicle operated by Charles W. Nickelson, Jr., deceased, and a truck driven by Appellee, Glenn M. Wilt. Appellee, Sandra B. Wilt, was a passenger in her husband's truck. As a result of the collision, Charles W. Nickelson, Jr. and Charles W. Nickelson, III were instantly killed. Appellees, Glenn and Sandra Wilt, suffered personal injury, as did Lori Stokley Hall.

During the trial of this matter, no competent evidence of intoxication - as opposed to consumption - of Charles W. Nickelson, Jr., deceased, was proffered or admitted. Nevertheless, the trial court, over objection, instructed the jury on the law of driving under the influence and also instructed the jury that punitive damages may be awarded for malicious, oppressive, intentional, or willful, reckless, or criminally indifferent activity. Furthermore, the jury was permitted to hear inadmissible hedonic damages testimony. As a result, the jury returned a verdict of $1,000,000.00 in punitive damages against the Estate of Charles W. Nickelson, Jr.

On December 13, 1993, this Court ruled that the hedonic damages testimony presented during the trial of this action was inadmissible and affirmed in part and reversed in part the final Order of the Circuit Court of Jefferson County, West Virginia. The Appellant seeks a rehearing on this issue

of punitive damages since it was in part based upon inadmissible testimony.

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III. ASSIGNMENTS OF ERROR

1. The Trial Court erred by invading the province of the jury by making a finding of fact of a contested issue and further erred by permitting an award of punitive damages based upon this finding without proper safeguards and instruction as to the awarding of punitive damages.

2. The Trial Court erred when it permitted the jury to consider punitive damages after hearing inadmissible hedonic damages testimony.

3. The Trial Court erred when it refused to conduct a meaningful post-trial review of the punitive damages award.

IV. POINTS AND AUTHORITIES

I. PUNITIVE DAMAGES SHOULD BE SET ASIDE.

In determining whether a verdict is supported by the evidence, every reasonable and legitimate inference fairly arising from the evidence in favor of the party for whom the verdict is returned must be considered and the facts which the jury might properly find under the evidence must be assumed as true. However, it is also clear that verdicts returned without adequate foundation must be amended or set aside. Ilosky v. Michelin Tire Corp., 172 W.Va. 435, 307 S.E.2d 603 (1983); Elsey Ford Sales, Inc. v. Solomon, 167 W.Va. 891, 280 S.E.2d 718 (1981). Furthermore, where a party seeks to recover damages which are indeterminate in nature, a verdict must be set aside as excessive if it is not supported by evidence or is so large so as to indicate that the jury was

influenced by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case. Earl J. Browder, Inc. v. County Court of Webster

County, 145 W.Va. 696, 116 S.E.2d 867, Syl. Pt. 4 (1960); Elsey, 280 S.E.2d at 721. Clearly, the verdict returned by the jury in the instant civil action was excessive. The verdict was not supported by the evidence and was so large that it indicated that the jury was influenced by passion, partiality, prejudice or corruption and, by Court instruction, the jury entertained a mistaken view of the case. Furthermore, the verdict was based upon inadmissible evidence which also mislead the jury and permitted the jury to be mislead and confused.

A. The trial court violated due process rights of the Appellant.

In instructing the jury that it could award punitive damages, the trial court violated the due process rights of the Appellant's decedent. The trial court did not adequately insure that the award of punitive damages would not be grossly disproportionate to the severity of the offense or to accomplish society's goals of punishment and deterrence such as is required by Pacific Mutual Life Ins. Co. v. Haslip, 113 L.Ed.2d 1, 111 S.Ct. 1032 (1991), and Garnes v. Fleming Landfill, Inc., 186 W.Va. 686, 413 S.E.2d 897 (1991). Moreover, the trial court did not engage in a "meaningful and adequate review" of the award during post-trial proceedings using well established principles as required. Garnes, 413 S.E.2d at 899, Syl. Pt. 2.

The trial court in instructing the jury on punitive damages stated many, but not all, of the Garnes factors which are to be considered by a jury in awarding punitive damages. Furthermore, the court instructed the jury to consider additional factors beyond those enunciated in Garnes. Specifically, the trial court advised the jury that punitive damages should bear a reasonable relationship to the harm that

is likely to occur from the Defendant's conduct as well as to the harm that actually has occurred. The court instructed the jury that it could consider the reprehensibility of the Defendant's conduct, how long the Defendant continued in his actions

and whether he was aware his actions were likely to cause harm, as well as the financial position of the Estate. The trial court did not advise the jury to consider whether the Defendant made reasonable efforts to make amends by offering a fair and prompt settlement, nor did the court instruct the jury concerning whether the Defendant profited from his wrong. Those elements, however, were not appropriate in the instant civil action. The court also instructed the jury to consider the nature of the Defendant's wrongdoing, the extent of harm inflicted and the party's intent.

1. Punitive damages should bear a reasonable relationship to the harm. The jury was presented with excessive damages based upon inadmissible testimony. Therefore, the jury, after being mislead by the testimony concerning hedonic damages, was unable to appropriately adjust its awards -- whether compensatory or punitive. After being presented unsupported testimony as to the harm that allegedly had and would occur to the Appellees via hedonic damages testimony, the jury did not and could not have an adequate foundation upon which to determine whether punitive damages bore a reasonable relationship to harm caused by the Defendant. This first factor to be considered by the jury was therefore circumvented by the trial court's admission of hedonic damages testimony.

2. The jury may consider factors of the Defendant's conduct including reprehensibility, how long the Defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the Defendant engaged in similar conduct in the past, and whether the Defendant made reasonable efforts to make amends by offering a fair and

prompt settlement for the actual harm caused once his liability became clear

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to him. The jury received little evidence of the Defendant's conduct and heard testimony only as to alcohol consumption and erratic driving. From that, however, the court found as a fact that Charles W. Nickelson, Jr., deceased, was driving under the influence and so instructed the jury. This act by the trial court again circumvented any meaningful deliberation and finding by the jury. The second factor, in determining whether to award punitive damages was also stripped from the jury's consideration.

The jury was instructed to consider the reprehensibility of the Defendant's conduct of driving under the influence as per the instructions of the court without hearing such testimony from the witness stand. The jury also utilized this finding of fact when it was instructed to consider how long the Defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm and whether he attempted to conceal or cover up his actions or the harm caused by them, and whether/how often he engaged in similar conduct in the past. The court, however, did not instruct the jury to consider whether the defendant attempted to conceal or cover up his actions or the harm caused by them.

3. Punitive damages should remove any profit the Defendant made from his wrongful conduct. The trial court did not instruct the jury as to the removing of any profit which the Defendant may have made from his conduct since this was not an issue in the instant civil action. The third factor for the jury's consideration, therefore, need not be considered in any post-trial review.

4. As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages. While the trial court properly instructed the jury that punitive damages should bear a

reasonable relationship to compensatory damages, it is clear that

the award does not bear that required relationship thereby violating fundamental fairness and the due process rights of Charles W. Nickelson, Jr., deceased. When the underlying compensatory damages were inflated by inadmissible evidence and unproven claims, any large punitive damages award would also be incorrect.

While the trial court instructed the jury that punitive damages should bear reasonable relationship to compensatory damages, the jury was unable to do so based upon the improper introduction of hedonic damages testimony. After the introduction of such testimony,the jury was mislead as to the actual compensatory damages, and was unable to assign punitive damages, if any, proportionately. Only the trial court could have insured that the fourth factor was complied with. However, when the trial court permitted the hedonic damages testimony as an element of compensatory damages, it became a foregone conclusion that punitive damages could not bear a reasonable relationship to actual compensatory damages.

5. The financial position of the Defendant is relevant. The trial court also instructed the jury that in awarding punitive damages it could consider the financial position of the Defendant. Yet, it was clear from the testimony as presented, and from arguments of counsel for the Appellees, that an insurer was involved. Due to the minimal assets of Charles W. Nickelson, Jr., deceased, in contrast to the enormous amounts of damages which the Appellees were seeking via testimony and demonstrative evidence on the issue of hedonic damages, it was eminently clear to the jury that a source other than the Estate of Charles W. Nickelson, Jr., deceased, would be liable for any verdict returned. This fact was further supported by the testimony presented as to minimal personal assets of Charles W. Nickelson, Jr., deceased, and further by the specific instruction of the Court

that the Sheriff would not be liable in any manner

as a result of the verdict.

Therefore, for the foregoing reasons, the trial court did not properly constrain the jury in its discretion of awarding punitive damages and moreover, the trial court violated the due process rights of the Defendant in permitting the jury to award punitive damages when adequate testimony and evidence to support such an award were clearly absent.

B. The award was based in part on inadmissible evidence and should be set aside.

Moreover, having permitted inadmissible testimony to be considered by the jury, the $1,000,000.00 award of punitive damages is partly based upon improper testimony which again corrupted and mislead the jury. The jury was given no guidance, nor were any parameters set which could help the jury to distinguish between the award of punitive damages based upon the admissible as opposed to the inadmissible portion of the testimony presented at trial. There likewise is no way to distinguish between a proper and an improper punitive damages award post-trial. Therefore, the award based in part upon inadmissible testimony, not subject to delineation must be set aside.

C. The Appellant has been denied a meaningful post-trial review.

Garnes also requires a trial court to conduct a post-trial review. In its post-trial review, however, the trial court did not consider the factors upon which it instructed the jury, nor did it take into account the additional factors necessary for a meaningful post-trial review. Moreover, in permitting the Appellees to accept either a remittitur of only $225,000.00 or

a new trial without any regard to a review or reduction of the punitive damages award again deprives the Appellant of the meaningful post-trial review he is assured in Garnes.

In reviewing an award of punitive damages, the trial court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

1. The costs of the litigation;

2. Any criminal sanctions imposed on the defendant for his conduct;

3. Any other civil actions against the same defendant based on the same conduct; and

4. The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the Plaintiff.

Id., 413 S.E.2d at 900, Syl. Pt.4.

In its post-trial review, however, the trial court did not fully consider the foregoing additional factors. Moreover, if a remittitur of only $225,000.00 of the improper verdict is permitted without further consideration, this Court will also have failed to provide meaningful post-trial review to the Appellant.

The costs of this litigation are in excess of costs for standard personal injury litigation due only to the Appellees' late request to present an additional claim of hedonic damages which has been deemed to be inadmissible only after the parties incurred extreme expense in retaining expert witnesses and the other costs associated therewith. Apart from the additional claim of hedonic damages, the costs of this litigation would not have been out-of-line with similar

litigation. This undue expense was a fault of the Appellees and should be considered in favor of the Appellant.

No criminal sanctions were imposed because Charles W. Nickelson, Jr. was killed as a result of this collision. The Court, therefore, need not consider this element.

Several companion cases arising from the same accident, based upon the same conduct and

against the same Defendant,were filed in the Circuit Court of Jefferson County and all were settled prior to the trial of this action. Those companion cases included a declaratory judgment action wherein the Circuit Court of Jefferson County determined that the amount of underinsured motorist coverages available to the Wilts was equal to the amounts for which their insurer had previously offered to settle. Appellees counsel, however, asserted and continues to assert, additional underinsured coverages are available which necessitated the trial of this action. The trial court, however, failed to consider the attempt to reach a fair and reasonable settlement in this action. The fact that companion cases were settled prior to trial and that State Automobile Mutual Insurance Company, the insurer of Charles W. Nickelson, Jr. and the Wilts, offered to its insured the amount of underinsured motorist coverages subsequently determined by the Circuit Court to be the proper amount, is indicative of the fact that a fair and reasonable settlement was attempted. This factor should be considered most favorable to the Appellant.

The fourth and final factor which the Court should consider in reviewing the award of punitive damages is the appropriateness of the punitive damages and its effect in encouraging fair and reasonable settlements when a clear wrong has been committed. The appropriateness of punitive damages must be considered in light of the evidence presented. The evidence presented in the instant civil action, however, is of alcohol consumption, not intoxication, and therefore, the requisite for punitive damages was not met, thereby rendering an award of punitive damages inappropriate. Moreover, the introduction of inadmissible hedonic damages testimony overinflated the value and severity of the instant civil action which directly lead to the excessive punitive damages award. The trial court failed to adequately instruct the jury that punitive damages should bear a reasonable

relationship to the harm that is likely to occur from

the Defendant's conduct and failed to exclude hedonic damages testimony from the jury's consideration when awarding punitive damages. Rather, the trial court instructed the jury on the law of driving under the influence which constituted a finding of fact by the trial court that the decedent was driving under the influence. This judicial finding of fact invaded the province of the jury and ignored the fact that no testimony was permitted during the trial of this action to support this finding. The instructions, and lack thereof, therefore, improperly influenced the jury and gave the panel a mistaken view of the case. These factors are interactive and must be considered as a whole upon review. TXO Production Corp. v. Alliance Resources Corp., 113 S.Ct. 2711 (1993).

Upon post-trial review, the trial court was again presented with argument and authority that hedonic damages testimony was improperly admitted and therefore, lead to an inappropriate result. As per this Court's previous ruling in this action, hedonic testimony is inadmissible and should not have been presented to the jury in this case and therefore, any award which resulted therefrom is inappropriate and should be set aside.

In reflecting upon the punitive damages award returned by the jury in the instant civil action, this Court must protect the constitutionally mandated due process rights of the Estate of Charles W. Nickelson, Jr., deceased, and should find that the punitive damages award returned against it was a result of bias, passion and prejudice of the jury based upon improper instruction, inadmissible testimony and was further the result of unfettered jury discretion without due safeguards imposed.

CONCLUSION

Since the ruling that hedonic damages testimony is

inadmissible in the State of West

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Virginia, the Estate of Charles W. Nickelson, Jr. has been denied its constitutionally mandated post-trial review, wherein the trial court should at a minimum consider factors given to the jury. Since the jury considered an improper element of damages, the trial court in its cursory post-trial review did not conduct a meaningful post-trial review without seriously considering whether the award of punitive damages was based at least in part upon the improper testimony presented at trial. In its December 13, 1993, Opinion, this Court permitted the Plaintiff to either accept a remittitur of the $225,000.00 awarded by the jury for loss of enjoyment of life or to accept a new trial based upon damages only. That option, however, overlooks another improper award of damages, punitive damages, which was partly based upon the inadmissible evidence and again denies the Estate of Charles W. Nickelson, Jr., deceased, constitutional safeguards.

For the foregoing reasons, the Appellant respectfully requests that this Court rehear the issue of punitive damages in this action and either issue a remittitur for the improper award of $1,000,000.00 or in the alternative order a new trial of the instant civil action.

Respectfully submitted,

ROBERT BURACKER, SHERIFF, AS SUCCESSOR IN INTEREST TO ROY E. THOMPSON, ADMINISTRATOR TO THE ESTATE OF CHARLES W. NICKELSON, JR., DECEASED
BY COUNSEL

MARTIN & SEIBERT, L.C.

BY: /s/ E. Kay Fuller

E. Kay Fuller
119 S. College St.
P.O. Box 1286
Martinsburg, WV 25401
(304) 267-8985

CERTIFICATE OF SERVICE

I, E. Kay Fuller, counsel for the Appellant, in the foregoing action, hereby certify that I have served a true copy of the foregoing **PETITION FOR REHEARING** upon the following counsel, by mailing the same to them by U.S. Mail, First Class, postage prepaid, at their respective addresses, this 11th day of January, 1994.

William Richard McCune, Esquire
JACKSON & KELLY
P.O. Box 1068
Martinsburg, WV 25401-1068

John C. Skinner, Jr., Esquire
NICHOLS & SKINNER, L.C.
P.O. Box 487
Charles Town, WV 25414

/s/ E. Kay Fuller
E. Kay Fuller

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Appendix Tab C

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 26th day of January, 1994, the following order was made and entered:

Glenn M. Wilt and Sandra B. Wilt,
Plaintiffs Below, Appellees

vs.) No. 21708

Robert Buracker, Sheriff as Successor
in Interest to Roy E. Thompson,
Administrator to the Estate of Charles
W. Nickelson, Jr., deceased, Defendant
Below, Appellant

The Court, having maturely considered the petition for rehearing and reargument filed in the above-captioned case, is of opinion to, and doth hereby deny the prayer of the petitioner and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk, Supreme Court of
Appeals

Appendix Tab D

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

GLENN M. WILT and
SANDRA B. WILT,

PLAINTIFFS,

VS. **CIVIL ACTION NO. 88-C-186**

ROBERT BURACKER, Sheriff,
as Successor in Interest to
ROY E. THOMPSON, Administrator
to the Estate of Charles W.
Nickelson, Jr., deceased,

DEFENDANTS.

AMENDED MOTION FOR POST-TRIAL RELIEF

COMES NOW the Defendant, Robert Buracker, Sheriff, as Successor in Interest to Roy E. Thompson, Administrator to the Estate of Charles W. Nickelson, Jr., deceased, by and through his counsel, Walter M. Jones, III, E. Kay Fuller and Martin & Seibert, L.C., and respectfully moves this Court for the following post-trial relief:

Pursuant to Rule 50 of the West Virginia Rules of Civil Procedure, the Defendant moves for entry of an Order of Judgment Notwithstanding the Verdict. In support of his Motion for Judgment Notwithstanding the Verdict, the Defendant asserts that the trial court erred in denying the Defendant's Motion for a directed verdict on the issues of liability and damages. With respect to the Defendant's Motion for a directed verdict as presented at the close of the

Plaintiffs' case-in-chief on the issue of liability, the trial court erred when it refused to grant the Defendant a directed verdict despite the fact that the

Plaintiffs failed to establish by a preponderance of the evidence that the Defendant was guilty of negligence which proximately caused the accident and resulting injuries. With respect to the Defendant's Motion for a directed verdict on the issue of damages, the trial court erred in refusing to direct a verdict in favor of the Defendant on three elements of damages: (1) the Plaintiffs presented speculative evidence as to future dental expenses of Plaintiff, Glenn M. Wilt; (2) the Plaintiffs failed to establish a prima facie case supporting an award of the recovery of punitive damages; and (3) the Plaintiffs presented conflicting and speculative evidence as to the claim to recover the value of household services.

Pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the Defendant alternatively moves for a new trial based upon five errors committed by the trial court. In support of his motion, the Defendant would state that the trial court erred in: (1) forcing the Defendant to exhaust its preemptory strikes to remove from the jury panel tainted jurors who should have been stricken for cause and permitting to sit on the jury a juror who stated during individual voir dire that he had a preconceived notion toward the truthfulness of a witness called on behalf of the Plaintiffs; (2) permitting the Plaintiffs to present evidence of hedonic damages when such evidence is not admissible and the attempt to quantify the value of a human life is not generally accepted in the field of forensic economics; (3) allowing testimony of an economist concerning the value of lost household services allegedly suffered by Plaintiff, Sandra B. Wilt, when

such testimony was presented without an adequate foundation and was speculative; (4) refusing to strike from the jury's consideration future dental expenses of Plaintiff, Glenn Wilt, despite the fact that the Plaintiffs failed to present evidence to a reasonable degree of medical certainty concerning such future dental expenses; and, (5) instructing the jury on the element of punitive damages and permitting the jury to award punitive damages without sufficient evidence to establish a claim upon which punitive damages could be awarded.

Alternatively, the Defendant moves pursuant to Rule 59 of the West Virginia Rules of Civil Procedure to alter and amend the verdict of the jury returned December 20, 1991. In support of his Motion to alter and amend the verdict, the Defendant would state that the verdict is based upon improper elements of damages: (1) the verdict includes the award of punitive damages without sufficient evidence upon which to base an award of punitive damages; (2) the verdict includes an award of future dental expenses to Plaintiff, Glenn M. Wilt, when testimony as to the future medical expenses of Plaintiff, Glenn M. Wilt, was not presented to a reasonable degree of medical certainty; (3) the verdict includes damages for lost household services and the loss of enjoyment of life when such awards were returned without an adequate foundation therefor; and, (4) the verdict includes damages for loss of enjoyment of life based upon inadmissible evidence of hedonic damages.

Pursuant to Rule 60 of the West Virginia Rules of Civil Procedure, the Defendant moves for relief from judgment. In support of its Motion, the Defendant would state that the Order of the Circuit Court of Jefferson County entered the 15th day of May, 1992 grants to the Plaintiffs a sum which aggregates interest impermissibly. Furthermore, the Defendant is entitled to a verdict credit in the amount of $79,681.79 which constitutes the recovery of Plaintiffs Glenn M. and Sandra B. Wilt from a companion interpleader action filed in the Circuit Court of Jefferson County styled State Automobile Mutual Insurance Company, Plaintiff, v. Penny Nickelson, Administratrix of the Estate of Charles W. Nickelson, III, Lori Stokely, Glenn M. Wilt, Sandra B. Wilt, and Roy E. Thompson, as Successor in Interest to Donald B. Giardina, Administrator of the Estate of Charles W. Nickelson, Jr., Defendants, Civil Action No. 88-C-77, plus a corresponding interest reduction.

The Defendant further states the Verdict Order impermissibly permits any award of pre-judgment interest on the jury's award of the loss of household services to Plaintiff Sandra B. Wilt in contravention of West Virginia Code §56-6-31.

In further support of his Motion, the Defendant relies upon the Memorandum of Law filed herein.

WHEREFORE, the Defendant, Robert Buracker, respectfully requests post-trial relief via Judgment Notwithstanding The Verdict, a New Trial and Alteration or Amendment of the Verdict of the Jury returned December 20, 1991, or alternatively relief from judgment by striking impermissible aggregation of interest and

granting to the Defendant a verdict credit.

ROBERT BURACKER, SHERIFF, AS SUCCESSOR IN INTEREST TO ROY E. THOMPSON, ADMINISTRATOR TO THE ESTATE OF CHARLES W. NICKELSON, JR., DECEASED
BY COUNSEL

MARTIN & SEIBERT, L.C.

By: /s/ E. Kay Fuller
Walter M. Jones, III
E. Kay Fuller
P.O. Box 1286
119 South College Street
Martinsburg, WV 25401
(304) 267-8985

CERTIFICATE OF SERVICE

I, E. Kay Fuller, Counsel for the Defendant in the foregoing action, hereby certify that I have served a true copy of the foregoing **AMENDED MOTION FOR POST-TRIAL RELIEF** upon the following counsel, by mailing the same to them by U.S. Mail, First Class, postage prepaid, at their respective addresses, this 26th day of May, 1992.

Dale Buck, Esquire
JACKSON & KELLY
P.O. Box 1068
Martinsburg, West Virginia 25401

John C. Skinner, Jr., Esquire
NICHOLS & SKINNER, L.C.
P.O. Box 487
Charles Town, West Virginia 25414

/s/ E. Kay Fuller
E. Kay Fuller

IN THE CIRCUIT COURT OF JEFFERSON COUNTY,

WEST VIRGINIA

GLENN M. WILT and
SANDRA B. WILT,

PLAINTIFFS,

VS. **CIVIL ACTION NO. 88-C-186**

ROBERT BURACKER, Sheriff,
as Successor in Interest to
ROY E. THOMPSON, Administrator
to the Estate of Charles W.
Nickelson, Jr., deceased,

DEFENDANTS.

MOTION FOR A REMITTITUR

COMES NOW the Defendant, Robert Buracker, Sheriff, as Successor in Interest to Roy E. Thompson, Administrator to the Estate of Charles W. Nickelson, Jr., deceased, by and through his counsel, Walter M. Jones, III, E. Kay Fuller and Martin & Seibert, and moves this court for a Remittitur in the amount of $1,350,000.00. In support of his Motion, the Defendant would state that the jury's verdict of $1,533,361.41 is not entirely supported by the evidence and specifically that $1,350,000.00 of the total verdict is unsupported by the evidence and should therefore be subject to a Remittitur or in the alternative a new trial. In further support of his Motion, the Defendant relies upon the Memorandum of Law filed herein.

ROBERT BURACKER, SHERIFF, AS SUCCESSOR IN INTEREST TO ROY E. THOMPSON, ADMINISTRATOR TO THE ESTATE OF CHARLES W. NICKELSON, JR., DECEASED
BY COUNSEL

MARTIN & SEIBERT

By: /s/ E. Kay Fuller
E. Kay Fuller
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119 South College Street
Martinsburg, WV 25401
(304) 267-8985

CERTIFICATE OF SERVICE

I, E. Kay Fuller, Counsel for the Defendant in the foregoing action, hereby certify that I have served a true copy of the foregoing **MOTION FOR A REMITTITUR** upon the following counsel, by mailing the same to them by U.S. mail, First Class, postage prepaid, at their respective addresses, this 26th day of May, 1992.

Dale Buck, Esquire
JACKSON & KELLY
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John C. Skinner, Jr., Esquire
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Charles Town, West Virginia 25414

/s/ E. Kay Fuller
E. Kay Fuller

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

GLENN M. WILT and
SANDRA B. WILT,

PLAINTIFFS,

VS. **CIVIL ACTION NO. 88-C-186**

ROBERT BURACKER, Sheriff,
as Successor in Interest to
ROY E. THOMPSON, Administrator
to the Estate of Charles W.
Nickelson, Jr., deceased,

DEFENDANTS.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR POST-TRIAL RELIEF

COMES NOW the Defendant Robert Buracker, Sheriff, as Successor in Interest to Roy E. Thompson, Administrator to the Estate of Charles W. Nickelson, Jr., deceased, by and through his counsel, Walter M. Jones, III, E. Kay Fuller and Martin & Seibert, and in support of his Motion for Post-Trial Relief, does state as follows:

STATEMENT OF FACTS

On or about May 3, 1986, a collision occurred on U.S. 340 approximately two tenths of a mile north of the Virginia border in Jefferson County, West Virginia involving an automobile driven by Charles W. Nickelson, Jr., deceased,

and a truck driven by Glenn M. Wilt. As a result of the collision, Charles W. Nickelson, Jr. and his infant son, Charles W. Nickelson, III, were killed. A passenger in the Nickelson vehicle, Lori S. Hall, was injured. Also injured in the collision were Plaintiffs, Glenn and Sandra Wilt. As a result of the collision, suit was filed in the Circuit

Court of Jefferson County, West Virginia styled Glenn M. Wilt and Sandra B. Wilt vs. Robert Buracker, Sheriff as Successor in Interest to Roy E. Thompson, Administrator to the Estate of Charles W. Nickelson, Jr., deceased, Civil Action No. 88-C-186. A trial of the matter was held before a jury with the Honorable Ronald E. Wilson presiding, beginning December 18, 1991 with a verdict returned by the jury on December 20, 1991, against the Defendant in the amount of $1.5 million. At issue in the trial was the liability of Charles W. Nickelson, Jr., deceased, and the damages sustained by the Plaintiffs.

During voir dire, the trial court inquired of potential jurors as to their knowledge of, or familiarity with the parties. In response thereto, Lawrence Hawk indicated he was a classmate of Brian Wilt, a son of the Plaintiffs and a witness called to testify as to the damages sustained by the witness's mother. During personal voir dire at the bench, attended by the trial court and counsel for the parties hereto, Mr. Hawk indicated that he had a preconceived opinion that Brian Wilt is a truthful person. The trial court, however, refused to strike Mr. Hawk for cause and the juror sat on the jury as defense counsel had exhausted all peremptory strikes in order to strike other jurors from the jury panel.

The trial court also refused to strike for cause Rodney White, a reporter for The Morning Journal newspaper, who stated he had heard about the accident, stating that his information came from the Sheriff, and that it was "possibly a D.U.I." The defense

was forced to exhaust a peremptory strike in order to remove Mr. White from the jury.

During the trial of this matter, the Plaintiffs presented evidence of expert witnesses, a psychologist and an economist, who attempted to quantify losses allegedly sustained by Plaintiff Sandra B. Wilt as a result of the collision, and attached a monetary value to the value of Ms. Wilt's life and her losses allegedly attributed to the May 3, 1986 collision. Furthermore, the economist proffered testimony concerning the value of household services, past and future, due to the fact that Sandra B. Wilt, when injured, could not perform household services. Also presented, however, was testimony that the Wilts expended approximately $10.00 per week for household services rather than the $8.33 per hour (utilizing hours lost per week ranging from 22 - 9.28) cited by the economist as the value of household services in the Ranson area. Moreover, a witness presented by the Plaintiffs testified as to the time actually expended in the Plaintiffs' household to perform household services with such time being approximately two hours per week. However, the economist used as a base figure 35 hours per week to perform household services in the Plaintiff's household.

Doctor Leroy R. Jackson also testified on behalf of the Plaintiffs concerning future dental expenses of Glenn M. Wilt. Dr. Jackson testified that future dental expenses of Plaintiff, Glenn M. Wilt, would cost approximately $550.00, yet could not testify to a reasonable degree of dental or medical certainty that

dentures and partial plates worn by Glenn M. Wilt would need to be replaced in the future solely as a result of the may 3, 1986 collision. Rather, Dr. Jackson testified that Glenn M. Wilt wore false teeth prior to the accident and that all false teeth must be replaced at some time in the future. Dr. Jackson could not testify to a reasonable degree of medical certainty that the false teeth worn by Glenn M. Wilt would be replaced in the future as the result of the May 3, 1986 collision.

Through a Motion in limine, a toxicology report made by the West Virginia State Medical Examiner's office performed upon the body of Charles W. Nickelson, Jr., deceased, was excluded from evidence. The basis of the exclusion was that the test was administered in 1986 pursuant to statute, West Virginia Code §17C-5B-2 which at the time of administration, held that results of such tests were inadmissible. No other competent evidence of intoxication, as opposed to consumption, of Charles W. Nickelson, Jr., deceased, was proffered or admitted. Rather, testimony of "erratic" driving behavior of the Nickelson vehicle moments prior to the collision, a statement of Lori Hall concerning consumption of amounts of alcohol by Charles W. Nickelson, Jr. the day of the fatal collision, and the presence of alcohol in the vehicle was admitted. Nevertheless, the trial court, over the objection of defense counsel, instructed the jury on the law of driving under the influence and stated that driving under the influence is prima facie negligence. Based upon evidence of alcohol consumption, but lacking any evidence of intoxication, the trial court also

instructed the jury that punitive damages may be awarded for malicious, oppressive, intentional, or willful, reckless or criminally indifferent activity. As a result, the jury returned a verdict of one million dollars ($1,000,000.00) in punitive damages against the Defendant, apportioning $500,000.00 to each Plaintiff.

ARGUMENT

I. FORCING THE EXHAUSTION OF PREEMPTORY STRIKES FOR BIASED WITNESSES DURING VOIR DIRE CONSTITUTES REVERSIBLE ERROR

The trial court should have stricken for cause juror Lawrence Hawk based on his statement that he believed Brian Wilt was a truthful person (R.I., p. 40-41). He stated that he had known Brian Wilt since school and had played football with him. He does not remember the accident but did state that if Brian Wilt would testify, he would testify truthfully. His statement clearly indicates an insurmountable prejudice in favor of the Plaintiff, and the Defendant's counsel should not be required to use a peremptory strike to remove him from the jury. It should be noted that Defendant's counsel used both peremptory strikes to remove jurors who knew the Plaintiffs or facts of the case and that Mr. Hawk served as a juror despite the Motion to Strike for Cause.

> Either party in any action or suit may, . . . examine on oath any person who is called as a juror therein, to know whether he is ... sensible of any bias or prejudice ... and if it should appear to the court that such a person ... does not stand indifferent in the cause, another shall be called and placed in his stead

for the trial of that cause.

West Virginia Code §56-6-12.

The object of this statute is to secure a jury whose minds are wholly free from bias or prejudice, either for or against a party. State v. Hatfield, 48 W.Va. 561, 37 S.E. 626 (1900); State v. Sanders, 161 W.Va. 399, 242 S.E.2d 554 (1978). Jurors who on voir dire indicate possible prejudice should be excused, or should be questioned individually to determine whether they entertain a bias or prejudice for or against either party requiring their excusal. State v. Deaner, ____ W.Va. _____, 334 S.E.2d 627 (1985). Any doubt regarding the impartiality of a prospective juror must be resolved in favor of the party seeking to strike the prospective juror. Davis v. Wang, _____ W.Va. ____, 400 S.E.2d 230 (1990); State v. West, 151 W.Va. 209, 200 S.E.2d 859, 866 (1973); State v. Matney, ____ W.Va. ____, 346 S.E.2d 818, 822 (1986).

Mr. Hawk's statement constituted an unequivocal indication of bias favoring the Plaintiff's witness. Mr. Hawk would favor Brian Wilt's testimony under any circumstances. That fact alone requires the court to strike him for cause as Brian Wilt's testimony was instrumental to the Plaintiffs, damage case. Because his statement clearly raised a doubt as to his ability to be fair and impartial, any remaining question about his eligibility to serve on the jury must be resolved in favor of dismissal for cause. Matney, 346 S.E.2d at 822 (prospective juror properly struck for cause where he stated in voir dire that he knew defendant and decedent in murder trial).

The qualification of jurors is within the discretion of the trial court, and will not be set aside unless the error is plainly

manifest. State v. McMillion, 104 W.Va. 1, 138 S. E. 732 (1927) . However, "[t]he process of selecting jurors should endeavor to secure jurors who are not only free from prejudice, but are also free from the suspicion of prejudice." State v. Siers, 103 W.Va. 30, 136 S.E. 503 (1927). Both Lawrence Hawk and Rodney White failed to meet the litmus test of juror qualification, because they could not render a verdict solely upon the evidence and without bias or prejudice. State v. Wilson, 157 W.Va. 1036, 207 S.E.2d 174 (1974). Failure to discharge a clearly objectionable venireman constitutes reversible error, even where a peremptory challenge prevents the juror's impaneling. West, 200 S.E.2d at 865-66 . The prior relationship between Lawrence Hawk and Brian Wilt, the Plaintiff's son, should, ipso facto, constitute grounds for his dismissal from the jury panel. When combined with his clear statement of bias favoring the Plaintiffs witness, the Court's failure to strike Lawrence Hawk for cause constitutes reversible error. The potential prejudice surrounding the possible D.U.I., mandates the removal of cause of Rodney White.

In addition, Rodney White stated during individual voir dire that he had heard that this case was "possibly a D.U.I." Over the objection of the Defendant to strike Mr. White for cause, the Court allowed Mr. White to remain as a juror, forcing the Defendant to utilize one of his two peremptory challenges. Mr. White's statement demonstrated his preconceived notion of the case as well. The mere knowledge of a "D.U.I." in light of the evidence and the suppression of the blood alcohol report, goes to

the heart of the issue of punitive damages, especially when related to a conversation with, or concerning the Sheriff (the Defendant). This act of the trial court, therefore, denied the Defendant full use of his limited peremptory strikes.

Based upon this reversible error, the Defendant, Robert Buracker, respectfully requests the verdict of this tainted jury be set aside or amended or in the alternative that he be granted a new trial.

II. HEDONIC DAMAGES TESTIMONY IS INADMISSIBLE AND SHOULD NOT BE PERMITTED WITHOUT AN ADEQUATE FOUNDATION THEREFOR

The trial court erred when it permitted the Plaintiffs to present testimony of hedonic damages when such testimony is not recognized in this jurisdiction. The introduction of such testimony which was without foundation constituted undue prejudice to the Defendant resulting in reversible error.

While loss of enjoyment of life is a recognized element of a permanent injury award pursuant to Flannery v. U.S., 171 W.Va. 27, 297 S.E.2d 433 (1982), the attempt to quantify that element is not a recognized and permissible avenue to introduce a claim for damages.

The Plaintiffs proffered alleged experts to testify as to the value of Sandra wilt's life. That testimony, however, lacked a proper foundation and was therefore inadmissible as violative of Rule 401 of the West Virginia Rules of Evidence.

Furthermore, the attempt to quantify the loss of this intangible element of damages violates the prohibition of the West Virginia Supreme Court of Appeals concerning per diem assessments because testimony of an economic evaluation of the alleged loss of enjoyment of life is paramount to a per diem analysis which is specifically prohibited in West Virginia. Crum v. Ward, 146 W.Va. 421, 122 S.E.2d 18 (W.Va. 1961).

Moreover, the valuation of an economist is not logically or reasonably based and the testimony of Dr. Brookshire failed to consider Sandra Wilt's individual characteristics.

Dr. Brookshire uses two different "benchmarks" for calculating damages: one for the lost enjoyment of life per year for unknown persons in the amount of $39,781, and another for the total life value in the amount of $2,542,409. Dr. Brookshire maintains that these "benchmarks" are annual values of the ability to enjoy life, and that they come from the "total life value" of the unknown, statistically anonymous, average American life less the value of the "economic machine."

The total life value of the unknown, average American in 1991, according to Dr. Brookshire, was $2,542,409. This number comes from an article written by Ted Miller which reviews 67 "willingness to pay" studies, disregards 20 of these studies, adjusts the results of some of the remaining studies, averages the results of the remaining 47 studies, and concludes that the unknown statistically anonymous, average American life is worth $2,542,409 in 1991 dollars. Dr. Brookshire has not attempted to

validate the value of the average American life and has accepted the value as "created" by Ted Miller in his 1986 article. Willingness to pay studies, according to Dr. Brookshire, focus on what people, and in one instance government agencies, are willing to pay to preserve an unknown, statistically anonymous, average American life.

Dr. Brookshire calculates his hedonic damages benchmark by subtracting from the $2,542,409 the "economic machine" component (i.e. the income generating capacity) of the average American. The result of this subtraction, according to Dr. Brookshire, is the value of the ability to enjoy life which in an injury case is $1,782.602. This number is then divided by the remaining years of projected life expectancy for the unknown, statistically average American (i.e. 44.81 years). The result is $39,781 per year, which is Dr. Brookshire's benchmark value for the ability to enjoy life per year for the Plaintiff.

This annualized lost enjoyment of life is constant over the lifetime of an unknown, statistically anonymous, average American and would apply whether the Plaintiff were an infant or a person of retirement age. These manipulations, through the economic machine, however, never consider the earning capacity or lack thereof of a particularized Plaintiff.

Dr. Brookshire's "benchmark value" may or may not apply to the Plaintiff Sandra Wilt. It applies only if the jury determines that Sandra Wilt enjoyed life to the same extent as the statistically anonymous, average American. If the jury determines

that Sandra Wilt enjoyed life more than the average American, it should increase Dr. Brookshire's "benchmark value." On the other hand, if the jury determines that Sandra Wilt enjoyed life less than the average American, it must decrease the "benchmark value." Dr. Brookshire presumably defers to the sound discretion of a jury to determine whether Sandra Wilt enjoyed life to the same extent as the statistically anonymous average American. if Dr. Brookshire defers to the discretion of the jury to increase or decrease his benchmark values, then he should also defer to the sound discretion of the jury in assessing the damages of Sandra Wilt without the benefit of his statistically manipulated benchmark.

The benchmark value provided by Dr. Brookshire does not account for the varying levels of enjoyment of life from person to person, or for the same person as they grow older, have children, change jobs, and retire. The only calculation that Dr. Brookshire has made in an attempt to "personalize" his benchmark value for Sandra Wilt, is to apply her projected life expectancy to the annual benchmark, apply the percentages of lost enjoyment of life supplied by Dr. Parsons, and then reduce to present value. This calculation yields the number in his report of $685,493 which Dr. Brookshire identifies as being the present value of the lost enjoyment of life. Dr. Brookshire's attempt to "personalize" his benchmark for Sandra Wilt also relies upon percentages of lost enjoyment of life assumptions supplied by Dr. Parsons. If Dr. Parsons' assumptions are incorrect, then the resulting calculation performed by Dr. Brookshire would also be incorrect.

During his December 6, 1991 deposition, Dr. Brookshire stated that he could not "help a jury scientifically quantify pain and suffering." (Deposition p. 56). Yet Dr. Brookshire claims he can assist a jury in quantifying a much more intangible element of damages, that being the loss of enjoyment of life. Neither are elements which an expert, through mathematical calculations, can assess. Furthermore, any attempt to assess the loss of enjoyment of life as performed by Dr. Brookshire fails to consider pain and suffering and particularized components of Sandra Wilt. Of significance, Dr. Brookshire did not consider the pre-existing health conditions of Sandra Wilt in determining his calculations in her alleged loss of enjoyment of life and Dr. Brookshire stated "only a jury in my opinion can tailor that for things like pre-existing health ..." (Deposition, p. 58). Dr. Brookshire attempts to testify to the benchmark value of the "normal" enjoyment of life and states that a psychologist will then enable him to tailor the loss of enjoyment to the particular Plaintiff, yet Dr. Brookshire has consistently stated that he uses calculations of an average anonymous American, and that his calculations do not take into account pre-existing conditions of a particular Plaintiff. These inconsistencies alone should preclude Dr. Brookshire's attempt to quantify the loss of enjoyment of life. moreover, Dr. Brookshire testified that he relied upon the projections of Dr. George Parsons, yet he does not believe that Dr. Parsons has taken into consideration the pre-existing paralysis suffered by Mrs. Wilt as a result of an unrelated brain

abscess. (Deposition, pp. 60 & 62). When asked to locate in Dr. Parsons' report (which Dr. Brookshire relied upon in forming his calculations) where Dr. Parsons took into account diminution of Mrs. Wilt's enjoyment of life prior to the automobile accident which is the subject of the instant civil action, Dr. Brookshire could not locate such factor and stated "I doubt if there is anywhere I could point to it." (Deposition, pp. 60 & 62). Furthermore, Dr. Brookshire stated that he did not make a calculation as to the loss of enjoyment of life of Mrs. Wilt as a result of her previous brain surgery and resulting paralysis. Having admitted that pre-existing conditions - which would obviously impact the alleged loss of enjoyment of life of Mrs. Wilt - were not considered by either Dr. Parsons or Dr. Brookshire, the calculations by Dr. Brookshire in which he attempts to place a value on Mrs. Wilt's lost enjoyment of life are not reliable nor are they relevant. Without proper consideration of pre-existing conditions, any attempt to quantify any damages is mere speculation and should have been precluded.

In addition to the strong language found in Crum, supra, the court in Sargent v. Malcomb, 150 W.Va. 561, 146 S.E.2d 561 (W.Va. 1966), stated that "there is no exact formula for placing a money value on such matters as pain, suffering and mental anguish resulting from personal injuries or embarrassment resulting from bodily disfigurement or scars." Sargent, 126 S.E.2d at 566. Again in 1982 the court referred to recovery for pain and suffering damages as "unliquidated" because "there is no precise

monetary calculation that can be used to determine the amount of the loss." Flannery, 297 S.E.2d at 435.

This rationale applies to any attempt to value the lost enjoyment of life in a personal injury case. This measure of loss should be left in the capable hands of a jury without the unnecessary testimony of an expert, particularly when the expert fails to consider all elements which would impact a Plaintiff's enjoyment of life.

The testimony which Dr. Brookshire presented to the jury is also impermissible because his area of testimony is not generally accepted in his field. Without gaining general acceptance in the pertinent field, the testimony should have been excluded according to State v. Woodall, 182 W.Va. 15, 385 S.E.2d 253 (1989), and Rule 702 of the West Virginia Rules of Evidence.

Before an expert is permitted to testify based on publications as Michael Brookshire has done, these publications must first be shown to be authoritative in nature. Ventura v. Winegardner, 178 W.Va. 82, 357 S.E.2d 764 (1987). Michael Brookshire's testimony is not based on any authoritative studies or research but instead relies primarily on articles and summaries written about such research which were published in the Journal of Forensic Economics cited above. The Journal is published by The National Association of Forensic Economists of which Brookshire is a vice-president. In fact, the article by Ted Miller is the source upon which Dr. Brookshire relies.

It is Dr. Brookshire's testimony that he himself discredits the study upon which he now relies to place the value of a whole life. Dr. Brookshire has inherently admitted that the very studies he relies on are not generally accepted in the field. Absent such general acceptance the proffered testimony violates the Frye standard thereby rendering it inadmissible.

As Justice Neely pointed out in Roberts v. Stevens Clinic Hospital, Inc., 176 w.va. 492, 345 S.E.2d 791 (1986), a person would not trade a life for $10,000,000.00 nor $100,000,000.00 nor even $1,000,000,000.00. Id., 345 S.E.2d at 800. Dr. Brookshire testified that the willingness to pay studies upon which he relied have no statistical significance in calculating loss of enjoyment of life. (Deposition, p. 71). To then attempt to extrapolate a value for life from willingness to pay studies misinterprets the purpose of these studies, misapplies the results and defies logical reasoning, thereby rendering the testimony inadmissible.

Judge Copenhaver interpreted this identical testimony of Dr. Brookshire under the West Virginia Wrongful Death statute in Kee v. Imperial Foods, Co., Civil Action No. 2:89-0954, U.S.D.C. S.D. W.Va. (1991) and found that Dr. Brookshire's proffered testimony was speculative and not appropriate for jury consideration and therefore ordered it excluded. The trial court in this case should have likewise excluded this testimony.

The method of calculation of loss of enjoyment of life damages is purely speculative. It is not helpful to the jury as required by Rule 702, as any attempt to place a numerical value on

liquidated damages such as pain and suffering involve impermissible speculation. Crum, 122 S.E.2d 23-27. Even Dr. Brookshire admits that the "value of any specific life is not directly observable:" Brookshire and S. Smith, The Practice Book for Plaintiff and Defense Attorneys, 167 (Anderson, 1990).

To prevent speculation from passing as science, a proponent of a test or method not generally recognized in a particular scientific community bears the burden of proving that the method is reliable. State v. Woodall, 385 S.E.2d at 259-60. The Woodall standard requires the Plaintiffs to prove that the hedonic methodology is reliable to make it admissible, assuming arguendo that hedonic damages testimony is admissible at all.

Rule 702 requires that an expert's testimony assist the trier of fact to understand the evidence or to determine a fact in issue. Expert testimony as to matters of common knowledge and experience of the jurors is admitted only when the matter is difficult to comprehend or explain. Since the jury could comprehend the concept of the pleasures of life, no expert testimony of the dollar value on hedonic damages was necessary.

In State v. Clawson, 165 W.Va. 588, 270 S.E.2d 659, 676 (1980), the court noted that an expert's opinion lacks probative force where the conclusions are contingent, speculative or merely possible. "The better practice is to withhold any monetary figure from the jury's consideration which might be suggestive for amounts not proven in evidence". Since both Dr. Parsons' and Dr. Brookshire's testimony on loss of enjoyment of life damages is

speculative, it was not helpful to the jury and should have been excluded rather than permitted. The admission of the testimony confused or mislead the jury as is evidenced by its verdict which bears no resemblance to the testimony presented by the Plaintiffs as to the actual losses suffered.

Plaintiff Sandra Wilt was claiming, inter alia, future losses. Such future losses, however, must be proven with reasonable certainty. Jordan v. Bero, 158 W.Va. 28, 210 S.E.2d 618 (1974), Syl. Pt. 9.

In an attempt to prove her future losses, the Plaintiffs retained a psychologist and economist who attempted to measure the losses suffered by Mrs. Wilt and to project her losses in to the future with dollar figures attached thereto. The attempt to project the losses, however, fails to meet the criteria of Jordan and specifically ignores that such future losses must be proved with reasonable certainty.

Dr. George E. Parsons, the psychologist retained by the Plaintiffs to examine Mrs. Wilt, testified that he had not diagnosed Mrs. Wilt, yet testified as to alleged losses she has suffered, and attempted to project those losses. Furthermore, Dr. Parsons testified that in his professional opinion Mrs. Wilt had suffered a permanent loss and testified to a reasonable degree of psychological certainty that the cause of her losses was the collision. However, Dr. Parsons made no assessment of Mrs. Wilt's pre-existing conditions yet testified these conditions could have had a direct impact on her condition at the time of the accident

as well as her condition at the time of his examination. Dr. Parsons was aware of Mrs. Wilt's pre-existing condition, yet made no attempt to distinguish losses between the pre-existing condition and the losses she may have suffered as a result of the accident which is the subject of this litigation. Moreover, Dr. Parsons did not take into consideration the rehabilitation which Mrs. Wilt underwent and discounted her significant progress at the rehabilitation hospital.

While recognizing that rehabilitation would impact his impressions and projections, Dr. Parsons could not testify that any improvement made through rehabilitation would continue in the future, yet he wants a jury to believe his projections are reliable.

Of critical importance is the fact that Dr. Parsons could not validate his studies or projections, could not identify any other psychologist in the country that utilizes the instrument he has created which purports to measure hedonic losses, and could not point to any scientific literature in any field that supports his claim that one can measure the hedonic loss suffered by an individual in terms of percentages.

Dr. Michael Brookshire, the Plaintiffs' economist, attempted to quantify the losses suffered by Mrs. Wilt based upon the projections and calculations as provided by Dr. Parsons. Those underlying calculations, however, are invalid and any attempt to quantify losses based upon incorrect projections is also invalid. The projections made by Dr. Parsons fail to meet the Jordan

criteria that future losses must be proved with reasonable certainty. Id. at 634. The hedonic losses allegedly suffered by Mrs. Wilt are intangible and are not readily apparent, and, pursuant to Jordan, must be proved by expert opinion testimony to a reasonable degree of certainty. Id. at 635. Dr. Parsons can not opine to a reasonable degree of certainty as to the hedonic losses suffered by Mrs. Wilt as his assumptions, calculations and projections are invalid. Dr. Parsons has admitted to elements of Mrs. Wilt's psychological makeup which he should have taken into account in attempting to project future losses of an intangible nature such as hedonic damages. Without taking into account all relevant factors, any attempt to project future losses cannot be ascertained to a degree of reasonable certainty as the law in this jurisdiction requires, and should have been excluded.

Dr. Brookshire relied upon invalid projections in attempting to quantify the value of a human life and even assuming arguendo that such calculations can be made, the calculations at issue in this situation were incorrect and were not made to a reasonable degree of certainty. Presentation of testimony based on invalid projections was not proper. The calculations of Dr. Brookshire as to the value of a human life, therefore, should have been excluded.

This Court, in ruling upon the motion in limine to suppress the testimony of hedonic damages stated:

> The deposition of George Edward Parsons, Ph.d. has been reviewed by the Court. My understanding of the Court's interpretation of the 700 Rules and in particular 702 is that

> this testimony would not be barred. While I agree with your analysis and if I were making the rules, I would prohibit this testimony and I would prohibit Dr. Brookshire's testimony, but I'm not. And my understanding of the Supreme Court's interpretation of the rules dictates to me that this testimony is admissible and that all of your arguments go to not barring the testimony, but to the weight of the testimony. (Trial transcript, p. 124).

The West Virginia Supreme Court of Appeals has rejected a petition for appeal concerning the admissibility of hedonic damages testimony. Terry v. CMI Corporation, 186 W.Va. 102, 411 S.E. 2d 245 (1991). That act, however, is not a dispositive act by the West Virginia Supreme Court of Appeals on the question of whether hedonic damages testimony is permissible in this jurisdiction. Of particular significance is the fact that the Court did not accept the Terry case for full briefing and consideration and the Petition for Appeal does not squarely present the question of whether hedonic damages is a permissible element of recovery or whether it constitutes a double recovery.

It is well settled that an Order refusing certiorari only affirms the decision of the lower court in that particular case and does not constitute controlling authority.

The Court pointed out in State ex rel Smith v. Truman E. Gore, Commissioner, 150 W.Va. 71, 143 S.E.2d 791 (1965) that:

> A refusal to grant certiorari has no such significance. It simply means that fewer than four members of the Court, for various

reasons, deemed it desirable to review a decision of the lower court. The denial of certiorari by the United States Supreme Court does not indicate approval or disapproval of the decision of a State Court. Maryland v.

Baltimore Radio Show, Inc., 338 U.S. 912, 94 L.Ed. 562, 70 S.Ct. 252.

The Terry case has no applicability to the issues presented here and is not controlling precedent in order to determine whether hedonic damages testimony is admissible in the instant civil action.

Perhaps the most significant fact concerning the admissibility of this evidence is the statement of this court wherein the court expressed a willingness to exclude the proffered testimony on hedonic damages but chose not to, awaiting a ruling of the state Supreme Court.

III. FUTURE DENTAL EXPENSES OF GLENN M. WILT WERE NOT PROVEN TO A REASONABLE DEGREE OF MEDICAL CERTAINTY

In order to recover damages for future medical expenses, such medical expenses and the costs must be proved to a reasonable degree of medical certainty. Jordan, supra. In the instant civil action, the Plaintiffs attempted to make a claim for future dental expenses to be incurred by Glenn M. Wilt through testimony of his treating dentist, Dr. Leroy R. Jackson. Dr. Jackson, however, could not testify to a reasonable degree of medical certainty that Glenn M. Wilt would incur future dental expenses, nor could he delineate which future dental expenses would be attributable to routine dental care and the normal replacement of false teeth which Glenn Wilt wore prior to the May 3, 1986 accident, which is the subject of the instant civil action. Rather, Dr. Jackson

testified that prior to the accident Glenn Wilt wore false teeth and that normal wear and tear would require replacement in the future. When questioned by both Plaintiffs' and Defendant's counsel, Dr. Jackson could not testify to a reasonable degree of medical certainty as required by Jordan as to the future dental expenses which Glenn M. Wilt would incur as a result of the May 3, 1986 accident. The Plaintiffs' failure to present evidence to a reasonable degree of medical certainty as to future dental expenses to be incurred by Glenn M. Wilt should have precluded the Plaintiffs from presenting to the jury on its Verdict Form an element of damages for such future medical expenses. During its deliberations, the jury returned a verdict in the amount of $5,000.00 for future dental expenses to be incurred by Glenn M. Wilt when such award was not based upon the evidence and such an element should have been precluded from the jury's consideration. The Plaintiffs failure to comply with the Jordan principle should have prohibited the trial court from permitting the jury to consider future dental expenses as an element of damages to be awarded to Plaintiff Glenn M. Wilt.

IV. CLEARLY EXCESSIVE DAMAGES NOT SUPPORTED BY THE EVIDENCE OR BASED UPON INADMISSIBLE EVIDENCE MUST BE SET ASIDE

A. When a verdict is so large that it indicates that the jury was improperly influenced it must be set aside.

The trial court correctly excluded inadmissible evidence, particularly the toxicology report as prepared by the West

Virginia State Medical Examiner's office. Throughout the trial, limited evidence of alcohol consumption was presented to the jury, however, at no time was any evidence of intoxication presented to the jury, yet the trial court instructed the jury on driving under the influence laws and permitted instructions on punitive damages without an adequate foundation therefor.

In determining whether a verdict is supported by the evidence, every reasonable and legitimate inference fairly arising from the evidence in favor of the party for whom the verdict is returned must be considered and the facts which the jury might properly find under the evidence must be assumed as true. However, it is also clear that verdicts returned without adequate foundation must be amended or set aside. Ilosky v. Michelin Tire Corp., 172 W.Va. 435, 307 S.E.2d 603 (1983); Elsey Ford Sales, Inc. v. Solomon, 167 W.Va. 891, 280 S.E.2d 718 (1981). Furthermore, in an action wherein the compensation to which the Plaintiff is entitled to recover is indeterminate in character, the verdict of the jury may be set aside as excessive if it is not supported by evidence or is so large that the amount thereof indicates that the jury was influenced by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case. Earl T. Browder, Inc. v. County Court of Webster County, 145 W.Va. 696, 116 S.E.2d 867 (1960), Syl. Pt. 4.; Elsey, 280 S.E.2d at 721. Clearly the verdict returned by the jury in the instant civil action is excessive because it is not supported by the evidence and is so large that it indicates that the jury was

influenced by passion, partiality, prejudice or corruption and most definitely entertained a mistaken view of the case. The jury entertained a mistaken view of the case due to the trial court's incorrect instruction on the law of driving under the influence and the awarding of punitive damages when no testimony of driving under the influence was presented to the jury. Without adequate evidence of driving under the influence, any instruction of this nature was prejudicial to the interest of the Defendant. Moreover, absent adequate testimony or evidence of driving under the influence, any instruction on the awarding of punitive damages is also misfounded and prejudicial. It is clear by the excessiveness of the verdict that the jury was inflamed by arguments of Plaintiffs' counsel that the Defendant was driving under the influence at the time of the accident and was, therefore, influenced by passion, partiality, or prejudice. Furthermore, to instruct the jury that the Defendant was driving under the influence when no such evidence was presented and to permit Plaintiffs' counsel to mislead and confuse the jury by characterizing the Defendant as a drunken driver, permits the jury to entertain a mistaken view of the case. The only evidence which the jury could properly consider was evidence of alcohol consumption the day of the accident, specifically, the statement of Lori Hall, the only survivor of the Nickelson vehicle, who stated that she and Charles W. Nickelson, Jr. consumed two drinks together. This testimony alone does not make out sufficient evidence of intoxication and, therefore, the jury was mislead into

viewing this case as one involving a drunken driver without adequate foundation therefor.

In a constitutional analysis of punitive damages, the West Virginia Supreme Court of Appeals in Addair v. Majestic Petroleum Co., Inc., 160 W.Va. 105, 232 S.E.2d 821 (1977) stated that an excessive jury verdict would not be set aside unless the verdict is "monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and such as manifestly shows jury passion, partiality, prejudice or corruption." Id. at 825. A one million dollar verdict for punitive damages, particularly in light of the fact that it is unsupported by the evidence, is not only monstrous and enormous but is beyond any measure unreasonable and outrageous. In closing arguments, Plaintiffs' counsel instructed the jury to award enormous punitive damages to "send a message" while referring to the Defendant as a drunken driver without adequate evidence thereof. This argument of counsel inflamed the jury and brought about an excessive verdict indicating the jury's passion, partiality, prejudice and corruption as specifically prohibited by the decisions of this State's Supreme Court. While the jury could properly be informed of the evidence of alcohol consumption, it was prejudicial to the interest of the Defendant and patently incorrect to instruct or otherwise inform the jury of intoxication of the Defendant and to use such incorrect information as a basis for the awarding of punitive damages. The basis upon which an award of punitive damages is founded is not supported by any evidence presented to the jury and due to an

erroneous instruction offered by the Court, the jury entertained a mistaken view of the case. When improper instructions are offered by the Court and a verdict is returned which is unsupported by the evidence, the verdict may be set aside. Jordan, 210 S.E.2d at 638; Addair, 232 S.E.2d at 825. In the instant civil action, the jury was presented with no testimony of intoxication of Charles W. Nickelson, Jr. on May 3, 1986 and, therefore, to instruct the jury concerning driving under the influence or to offer punitive damages instruction based upon the alleged intoxication of the Defendant when that allegation is not supported by the evidence constitutes paramount prejudice to the interest of the Defendant and constitutes reversible error. Such an award of punitive damages, when not founded in the evidence, must be set aside. Therefore, the Defendant, Robert Buracker, respectfully requests that the judgment of the jury rendered against him as the Administrator of the Estate of Charles W. Nickelson, Jr., deceased, be amended to delete any award of punitive damages or in the alternative, that the entire verdict be set aside or that he be granted a new trial.

B. Any award of punitive damages without adequate due process safeguards is unconstitutional.

In instructing the jury that it may award punitive damages in this case, the trial court violated the due process rights of the Defendant. The trial court did not adequately insure that the award of punitive damages would not be grossly disproportionate to the severity of the offense or to accomplish society's goals of

punishment and deterrence such as is required by Pacific Mutual Life Ins. Co. v. Haslip, 113 L.Ed.2d 1, 111 S.Ct. 1032 (1991) and Fleming Landfill, Inc. v. Garnes, (No. 20284, W.Va., filed December 5, 1991). Moreover, these recent opinions require a "meaningful and adequate review by the trial court using well established principles." Fleming Landfill, sl.op. at 21.

In reviewing an award of punitive damages, the Court should, at a minimum, consider the following factors:

1. the costs of the litigation;
2. criminal sanctions imposed on the Defendant for his conduct;
3. any other civil actions against the same Defendant based on the same conduct; and
4. the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed.

The costs of this litigation are in excess of costs for standard personal injury litigation due to the Plaintiffs' late request to present an additional claim of hedonic damages which required the Plaintiffs and the Defendant to incur additional expense in retaining expert witnesses and the costs associated therewith, including but not limited to, travel for depositions and costs incurred in psychological examinations. Apart from the Plaintiffs' desire to present an additional claim of hedonic damages, the costs of this litigation would not have been out of line with similar litigation and, therefore, the Court need not consider the costs of this litigation as a factor to preclude the dismissal of the punitive damages award.

No criminal sanctions were imposed upon the Defendant for his conduct because Charles W. Nickelson, Jr. was killed as a result of this collision. Therefore, the trial court need not consider any criminal sanctions imposed upon the Defendant.

Several companion cases arising from the same accident based upon the same conduct and against the same Defendant were filed in the Circuit Court of Jefferson County and have each been settled. Those companion cases include a declaratory judgment in which the Circuit Court of Jefferson County determined the amount of underinsured motorist coverages available to the Wilts equal to the amounts which the insurer of Charles W. Nickelson, Jr., deceased, State Auto Mutual Insurance Company, previously offered to settle the instant civil action. Another relevant factor which the trial court should consider is the attempt to reach a fair and reasonable settlement. The fact that companion cases were settled prior to trial and that State Auto, the insurer of Charles W. Nickelson, Jr. and the Wilts, offered to the Wilts the amount of underinsured motorist coverages which was subsequently determined by the Circuit Court of Jefferson County to be that amount available to the Wilts is indicative of the fact that State Auto attempted a fair and reasonable settlement. Therefore, this factor should be considered most favorable to the Defendant.

The fourth and final factor which the trial court should consider in reviewing the award of punitive damages is the appropriateness of the punitive damages and its effect in encouraging fair and reasonable settlements when a clear wrong has

been committed. State Auto has consistently attempted to resolve the claim of the Wilts and was subsequently determined to have offered the appropriate amounts of underinsured motorist coverages to settle the instant civil action. Moreover, the appropriateness of punitive damages in this case must be considered in light of the evidence which was presented to the jury which clearly indicates that evidence sufficient to instruct the jury as to an award of punitive damages was not present. Therefore, an award of punitive damages was inappropriate in this trial.

When instructing the jury on punitive damages, the Court failed to adequately instruct the jury that punitive damages should bear a reasonable relationship to the harm that is likely to occur from the Defendants' conduct. Rather, the Court instructed the jury on the law of driving under the influence and permitted the jury to award punitive damages based on inadequate testimony with no evidence of driving under the influence. At no time during the trial of the instant civil action was the jury presented testimony or other evidence that Charles W. Nickelson, Jr. was driving under the influence at the time of the accident on May 3, 1986. Rather, the jury was only presented with scant evidence of alcohol consumption which did not rise to the level of intoxication sufficient to instruct the jury on driving under the influence laws and an award of punitive damages. Absent sufficient evidence of driving under the influence, any award of punitive damages did not and could not bear a reasonable relationship to the harm that is likely to occur from the Defendants' conduct as well as the harm that actually occurred.

Rather, the Court focused on the severity of the damages suffered by the Plaintiffs and permitted the jury to award punitive damages based upon the severity of the harm without regard to the fact that evidence as to the Defendant's level of intoxication was absent.

In instructing the jury to consider the reprehensibility of the Defendant's conduct, the Court specifically instructed the jury to consider that the Defendant, Charles W. Nickelson, Jr., deceased, was driving under the influence at the time of the accident despite the fact that no such evidence was presented to the jury. Therefore, the jury considered the reprehensibility of the Defendant's conduct as driving under the influence as per the instructions of the Court without hearing such testimony from the witness stand. This factor also takes into account that the jury was instructed that the Defendant was driving under the influence despite the lack of such testimony during trial when the Court instructed the jury to consider how long the Defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm and whether he attempted to conceal or cover up his actions or the harm caused by them, and whether/how often the Defendant engaged in similar conduct in the past.

The Defendant proffered an instruction on punitive damages which mirrors the Court's requirements of Fleming Landfill and the elements which a jury must consider prior to awarding punitive damages. The instruction, however, was denied by the trial court and an instruction proffered by the Plaintiffs which did not contain all of the necessary Fleming Landfill elements and

erroneously directed the jury to consider the intoxication of the Defendant was accepted. To reject the directives of the Fleming Landfill decision constitutes reversible error and the award of punitive damages should, therefore, be stricken.

As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages. Fleming Landfill, sl. op. at 22. While the trial court properly instructed the jury that punitive damages should bear a reasonable relationship to compensatory damages, it is clear from the jury's verdict that the punitive damages award does not bear a reasonable relationship to the compensatory damages and therefore violates fundamental fairness and the due process rights of Defendant Charles W. Nickelson, Jr., deceased.

The trial court properly instructed the jury that in awarding punitive damages, it could consider the financial position of the Defendant. Yet, it was clear from the testimony as presented and from arguments of Plaintiffs' counsel that an insurer was involved. While Plaintiffs' counsel did not refer specifically to the existence of liability insurance, due to the minimal assets of Charles W. Nickelson, Jr., deceased, in contrast to the enormous amounts of damages which the Plaintiffs were seeking via testimony and demonstrative evidence of its experts on the issue of hedonic damages, it was eminently clear to the jury that a source other than the Estate of Charles W. Nickelson, Jr., deceased, would be liable for any verdict returned. Therefore, for the foregoing reasons, the trial court did not properly constrain the jury in its discretion of awarding punitive damages and moreover the trial

court violated the due process rights of the Defendant in permitting the jury to award punitive damages when adequate testimony and evidence to support such an award were clearly absent. The West Virginia Supreme Court of Appeals in adopting the criteria of the U.S. Supreme Court clearly states that the U.S. Supreme Court has "expressly reserved judgment on the due process challenge to punitive damages awards" and held that the Haslip court "finally held that punitive damages awards could violate due process in some cases, ..." Fleming Landfill, sl. op. at 4. Without the proper constraints on the discretion of the jury and in permitting a jury to award punitive damages without adequate testimony upon which to support such an award, it is clear that the due process rights of Charles W. Nickelson, Jr., deceased, were violated in the instant civil action. Justice Neely, in writing for the Fleming Landfill Court, stated that "unchecked punitive damages awards, however, can have effects that are detrimental to society as a whole" and wrote that punitive damages "sometimes get out of hand." Id., sl. op. at pp. 5-6. The fact that punitive damages award sometimes "get out of hand" is clearly presented in this case wherein punitive damages in the amount of One Million Dollars was returned against a deceased Defendant based upon testimony that was never presented. In reflecting upon the instruction and the punitive damages award returned by the jury in the instant civil action, this Court must protect the constitutionally mandated due process rights of the Estate of Charles W. Nickelson, Jr., deceased, and should find that the punitive damages award returned against him was a result

of bias, passion and prejudice of the jury based upon improper instruction without adequate testimony to support the award and is the result of unfettered jury discretion. The trial court, therefore, may place the reasonable constraints upon the jury's discretion and may bring any verdict within a reasonable relationship to the harm, thereby protecting the due process rights of the Estate of Charles W. Nickelson, Jr., deceased. This may be accomplished by striking or drastically reducing the punitive damages award or by granting the Defendant a new trial.

For the foregoing reasons, the Defendant, Robert Buracker, respectfully requests that the punitive damages award returned against him as Administrator of the Estate of Charles W. Nickelson, Jr., deceased, be dismissed for inadequate foundation and because it violates the due process rights of Charles W. Nickelson, Jr.

C. Pre-judgment interest is not permitted for an award of loss of household services.

In awarding damages in the instant civil action, the jury included an award of loss of household services for Plaintiff Sandra B. Wilt. While the Plaintiffs argued they were entitled to an award for such a loss, any award for the loss of household services does not accrue pre-judgment interest.

West Virginia Code §56-6-31 delineates the elements of a jury award which are subject to pre-judgment interest. The Code identifies the elements of special damages subject to pre-judgment

interest as lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures as determined by the Court. The value of past lost household services does not fall within any of the aforementioned categories and therefore pre-judgment interest for this element of the award should be excluded.

CONCLUSION

The trial court erred when it permitted a friend of the family of the Plaintiffs to sit as a juror, refused to strike a potential juror for harboring preconceived notions about the case thereby causing defense counsel to exhaust peremptory strikes, and in permitting testimony of hedonic damages and future dental expenses without proper foundations. Moreover, the trial court improperly instructed the jury on driving under the influence and punitive damages without a proper basis which resulted in a monstrous and outrageous verdict against the Defendant. Due to the foregoing errors, the Defendant is entitled to an amended verdict or to have the entire verdict set aside. In the alterative, the Defendant is entitled to a new trial.

ROBERT BURACKER,SHERIFF, AS SUCCESSOR IN INTEREST TO ROY E. THOMPSON, ADMINISTRATOR TO THE ESTATE OF CHARLES W. NICKELSON, JR.,DECEASED
BY COUNSEL

MARTIN & SEIBERT, L.C.

By: /s/ E. Kay Fuller
E. Kay Fuller
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CERTIFICATE OF SERVICE

I, E. Kay Fuller, Counsel for the Defendant in the foregoing action, hereby certify that I have served a true copy of the foregoing **Memorandum of Law in Support of Defendant's Motions to Amend Judgment or in the Alternative for a New Trial** upon the following counsel, by mailing the same to them by U.S. Mail, First Class, postage prepaid, at their respective addresses, this 26th day of May, 1992.

Dale Buck, Esquire
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Charles Town, West Virginia 25414

/s/ E. Kay Fuller
E. Kay Fuller

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

GLENN M. WILT and
SANDRA B. WILT,

PLAINTIFFS,

VS. **CIVIL ACTION NO. 88-C-186**

ROBERT BURACKER, Sheriff,
as Successor in Interest to
ROY E. THOMPSON, Administrator
to the Estate of Charles W.
Nickelson, Jr., deceased,

DEFENDANT.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR A REMITTITUR

COMES NOW the Defendant Robert Buracker, Sheriff, as Successor in Interest to Roy E. Thompson, Administrator to the Estate of Charles W. Nickelson, Jr., deceased, by and through his counsel, Walter M. Jones, III, E. Kay Fuller and Martin & Seibert, and in support of his Motion for Remittitur does state as follows:

STATEMENT OF FACTS

Upon a trial of the instant civil action, a six person jury returned a verdict in the amount of $1,533,361.41 on December 20, 1991. Included in that amount are certain damages which were unsupported by the evidence, specifically

$1,000,000.00 in punitive damages, $225,000.00 for permanent injury including loss of enjoyment of life of Sandra B. Wilt, $120,000.00 for the value of past and future lost household services, and $5,000.00 for future dental expenses of Plaintiff Glenn M. Wilt.

With respect to the $1,000,000.00 punitive damages award returned by the jury, the court erred when it instructed the jury that Charles W. Nickelson, deceased was driving under the influence at the time of the accident of May 3, 1986 and that as such the jury could consider awarding punitive damages. Those instructions, however, are not supported by the evidence as the jury heard no testimony concerning the intoxication of Charles W. Nickelson, Jr., deceased, on May 3, 1986. Rather, the jury heard only scant evidence of alcohol consumption of Charles W. Nickelson, Jr., deceased, on May 3, 1986. Without sufficient evidence of intoxication, the jury could not consider an award of punitive damages as alcohol consumption without rising to the level of intoxication does not meet the criteria of recklessness, acting with malice, or criminal indifference necessary to support an award of punitive damages.

In presenting expert testimony on the issue of hedonic damages, the Plaintiffs' economist projected the loss of enjoyment of life of Sandra B. Wilt and estimated the value of her past and future lost household services. Those projections, however, are not reliable nor are they well founded to be rendered admissible evidence, but rather any permanent injury award including the loss of enjoyment of life is an element of damages which must be determined by the sound discretion of a jury without an attempt of a psychologist and an economist to place a monetary value on estimated losses of the Plaintiff with respect to lost household services. The evidence of the economist is clearly contradicted

by other evidence presented by the Plaintiffs, particularly that of Nancy Grove whom the Plaintiffs have contracted to perform household services. In her testimony, Ms. Grove stated that she worked approximately two hours per week in the Wilt household to perform household services and was paid an average $10.00 per week. While that is the circumstances which actually exist within the Wilt household, Dr. Brookshire in attempting to quantify the value of past and future lost household services of Plaintiff Sandra B. Wilt valued household services in the Ranson, Jefferson County at an arbitrarily established and averaged hourly rate based upon thirty-five hours per week. This evidence is clearly contradictory to the evidence of the witness who actually performs the household services for the Plaintiffs in the instant civil action.

Furthermore, the Plaintiffs presented testimony of Dr. Leroy R. Jackson regarding future dental expenses of Plaintiff Glenn M. Wilt. Dr. Jackson, however, could not testify to a reasonable degree of dental or medical certainty as to the necessity of replacing false teeth of Glenn M. Wilt which he wore prior to the May 3, 1986 accident. Furthermore, Dr. Jackson testified that future dental expenses for Glenn M. Wilt would cost approximately $550 for current replacement costs. The jury, however, awarded Glenn M. Wilt future dental expenses in the amount of $5,000.00 which is clearly contrary to the evidence presented during the trial of this matter.

The foregoing elements of the jury's verdict for the Plaintiff is not supported by the evidence and further indicates

that the jury was influenced by passion, partiality, prejudice or corruption or held a mistaken view of the case as prohibited in Jordan v. Barrow, _____ W. Va. _____, 210 S.E.2d 618 (1974). When such circumstances exist, the Plaintiff is permitted two choices that of a Remittitur or a New Trial. These options are particularly appropriate when the illegal part of damages is clearly distinguishable from the remainder of the verdict. "Where the amount in excess in an excessive verdict is definitely ascertainable, a remittitur may be properly employed." Fortner v. Napier, 153 W. Va. 143, 168 S.E.2d 737 (1969) Jordan 210 S.E.2d at 639 .

Clearly the trial court can determine the illegal part of the damages in the verdict which are clearly distinguishable from the remaining portions of the verdict. This court may ascertain the illegal portion of the damages without assuming the functions of the jury and substituting its judgment for the judgment of the jury. Therefore, this court may permit the Plaintiff to enter a remittitur for $1,350,000.00 and refuse the Defendant's Motion for a New Trial, or the Plaintiffs must submit to a new trial. Jordan 210 S.E.2d at 639.

In permitting the jury to consider elements of damages without adequate evidence the interest of the Defendant were prejudiced. Such prejudice constitutes reversible error. Jordan 210 S.E.2d at 639. Given the reversible error present in the instant civil action, the Plaintiff may agree to a remittitur to erase the reversible error or must submit to a new trial. It is incumbent upon the trial court to set aside a clearly wrong or

excessive verdict such as that return in the instant civil action.

Therefore, for the foregoing reasons the Defendant Robert Buracker respectfully requests that the Plaintiff enter into a remittitur in the amount $1,350,000.00 or in the alternative submit to a new trial.

ROBERT BURACKER, SHERIFF, AS SUCCESSOR IN INTEREST TO ROY E. THOMPSON, ADMINISTRATOR TO THE ESTATE TO CHARLES W. NICKELSON, JR., DECEASED BY COUNSEL

MARTIN & SEIBERT, L.C.

By: /s/ E. Kay Fuller
E. Kay Fuller
P.O. Box 1286
119 South College Street
Martinsburg, WV 25401
(304) 267-8985

CERTIFICATE OF SERVICE

I, E. Kay Fuller, Counsel for the Defendant in the foregoing action, hereby certify that I have served a true copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR A REMITTITUR** upon the following counsel, by mailing the same to them by U.S. Mail, First Class, postage prepaid, at their respective addresses, this 26th day of May, 1992.

Dale Buck, Esquire
JACKSON & KELLY
P.O. Box 1068
Martinsburg, West Virginia 25401

John C. Skinner, Jr., Esquire
NICHOLS & SKINNER, L.C.
P.O. Box 487
Charles Town, West Virginia 25414

/s/ E. Kay Fuller
E. Kay Fuller

Appendix Tab E

IN THE CIRCUIT COURT OF JEFFERSON COUNTY,
WEST VIRGINIA

GLENN M. WILT and SANDRA B. WILT, Plaintiffs	
VS.	CIVIL ACTION NO. 88-C-186
ROBERT BURACKER, Sheriff as Successor in Interest to ROY E. THOMPSON, Administrator to the Estate of Charles W. Nickelson, Jr., deceased, Defendants	

ORDER

Presently before the Court are the Amended Motion for Post Trial Relief and Motion for Remittitur filed by the Defendant.

The Court has now considered the motion of the Defendant for entry of an Order of Judgment Notwithstanding the Verdict and Defendant's Alternative Motion for a New Trial based upon five alleged errors committed by this Court. The Court has also considered the Defendant's Motion to Alter and Amend the Verdict of the Jury returned on December 20, 1991 and the Defendant's Motion for a Remittitur.

WHEREUPON, after reviewing the record and the

exhibits and the memoranda submitted by counsel and the arguments of counsel, the Court does find that the Defendant's Amended Motion for Post-Trial Relief and Motion for Remittitur are without merit and should be denied.

IT IS, ACCORDINGLY, ORDERED that Defendants' Motion for Entry of an Order of Judgment Notwithstanding the Verdict is denied.

The Defendants' Motion for a New Trial is denied. Defendant's Motion to Alter and Amend the Verdict the Jury Returned on December 20, 1991 is denied. Defendants' Motion for a Remittitur is denied. Defendants' exceptions to all of these rulings are noted for the record.

It is further ORDERED that this matter be dropped from the docket of this Court.

ENTER this 16 day of November, 1992.

/s/ Ronald E. Wilson
RONALD E. WILSON, JUDGE

Appendix Tab F

The Court further instructs the jury that the Plaintiffs [also] seek exemplary or punitive damages [in this case.] Exemplary, punitive or vindictive damages involve the blending of the interests of society in general with those of the aggrieved individual in particular. Such damages are awarded by way of punishment to the offender and as a warning to others or by way of example.

[A]n award of punitive damages may be awarded against the Estate of Charles W. Nickelson, Jr. if you believe he drove a motor vehicle while under the influence of alcohol or Charles Nickelson, Jr. acted with malice or oppression or intentionally or willfully or recklessly or with criminal indifference to the rights of Plaintiffs, Glenn M. Wilt and Sandra B. Wilt.

The purposes of punitive damages are (1) to punish a wrongdoer, (2) to deter others from pursing a like course of conduct, (3) to provide additional compensation to victims of a Defendant's reckless and wanton misconduct and (4) to provide a substitute for personal revenge by the wronged party.

Therefore, if you believe by a preponderance of the evidence that Charles W. Nickelson, Jr. drove a motor vehicle while under the influence of alcohol or acted with malice or oppression or intentionally or willfully or recklessly or with criminal indifference to the rights of Plaintiffs in causing the wreck in which the Plaintiffs injured, you may award the Plaintiffs punitive damages which together with and in reasonable proportion to the compensatory damages will in the judgment of the jury, be sufficient to deter others from engaging in a [like] course of conduct like the Defendant's and prevent further repetition of the type of reckless conduct in which Charles W. Nickelson, Jr. engaged. [a like course

of conduct.]

In determining the amount of punitive damages, if any, to award to the Plaintiffs, you should consider all of the circumstances surrounding the particular occurrence including the nature of the wrongdoing, the extent of harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances.

Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the Defendant's conduct as well as to the harm that actually has occurred. If the Defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

The jury may consider the reprehensibility of the Defendant's conduct. The jury should take into account how long the Defendant continued in his actions and whether he was aware his actions were causing or were likely to cause harm. whether he attempted to conceal or cover up his actions or the harm caused by them, and whether/how often the Defendant engaged in similar conduct in the past.

As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

You are further instructed that the Plaintiffs are not entitled to punitive damages as a matter of right, and that you do not have to find that the Plaintiffs are entitled to any, and that the awarding or not awarding thereof is a matter wholly within your discretion. Any award of punitive damages, however, must not exceed the amount which is necessary to accomplish society's goals of punishment and deterrence. An award of punitive damages must be reasonably based and may not be the product or bias or passion. The award of punitive damages must also be proportionate to the severity of the offense.

The Sheriff of Jefferson County is a party to this law suit only by virtue of a special law of West Virginia and neither the Sheriff, individually or in his capacity as sheriff, nor the taxpayers are in any way financially obligated to pay the verdict in this case.

Wells v. Smith, 297 S.E.2d 872 (W.Va. 1982)

Painter v Raines Lincoln Mercury, Inc., 323 S.E.2d 596 (W.Va. 1984)

Warden v Bank of Mingo, 341 S.E.2d 679 (W.Va. 1985)

GIVEN W/O OBJECTION ___
GIVEN OVER OBJECTION ___
REFUSED OVER OBJECTION ___
MODIFIED BY COURT ___
WITHDRAWN ___